Supreme Court, U.S.
FILED

10-202 AUG 11 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006), this Court held that a public employee who engages in speech "pursuant to" his official duties cannot invoke the protection of the First Amendment to insulate his speech from employer discipline. The questions presented are:

1. Whether the reasoning of *Garcetti* applies only to speech "required" by a public employee's official duties or extends to all speech "stemming from" or "related to" those duties.

2. Whether the inquiry into whether an employee spoke "pursuant to" his official duties is purely a question of law, which a court may resolve at summary judgment, or a mixed question of fact and law properly reserved for a jury.

RULE 14.1(b) STATEMENT

The parties to the proceedings below were plaintiff/appellant David H. Weintraub, and defendants/appellees the Board of Education of the City School District of the City of New York, Community School District 32, City of New York, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano, Lawrence Becker, and Jerry Cioffi.

David H. Weintraub died while the appeal was pending before the Second Circuit, and the district court substituted Gary N. Weintraub as administrator of the estate of David H. Weintraub. See App., *infra*., 93a–94a. Accordingly, the caption reflects Gary N. Weintraub as petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 14.1(b) STATEMENT ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
A. Factual Background 3
B. Procedural Background 4
REASONS FOR GRANTING THE PETITION 6
I. The Federal Courts Of Appeals Are Deeply Divided Over The Application Of *Garcetti* To Speech That Is Only Tangentially Related To An Employee's Official Duties. 6
A. The Courts Are Divided Over The Definition Of "Pursuant To" Under *Garcetti* 7
1. The Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, And D.C. Circuits Define "Pursuant To" To Include All Speech That Facilitates Official Duties 8
2. The Eighth And Ninth Circuits Define "Pursuant To" To Include Only Speech That Is Required By Official Duties 11
3. Mr. Weintraub Would Have Obtained A Different Result If He Had Been Employed Within The Jurisdiction Of The Eighth Or Ninth Circuits. 13

TABLE OF CONTENTS—continued

Page

B. The Courts Are Divided Over Whether The "Pursuant To" Standard Presents A Question Of Law Or A Mixed Question Of Law And Fact.....15

1. The Fifth, Tenth, And D.C. Circuits Regard The "Pursuant To" Standard As A Question Of Law.....16

2. The Third, Seventh, And Ninth Circuits Regard The "Pursuant To" Standard As A Mixed Question Of Law And Fact.....17

3. Mr. Weintraub Might Have Obtained A Different Result If His Case Were Litigated In The Third, Seventh, Or Ninth Circuits.....20

II. Review Is Also Warranted Because the Decision Below Is Wrong.....21

A. The Second Circuit's Construction Of The "Pursuant To" Standard Is Unworkable And Inconsistent With This Court's Precedents.....22

B. The Decision Below Improperly Affirms The District Court's Treatment Of The "Pursuant To" Standard As A Question Of Law.....26

III. This Case Presents An Issue Of Great Importance.....27

CONCLUSION.....30

APPENDICES

TABLE OF CONTENTS—continued

Page

A. The Second Circuit's Opinion 1a
B. The District Court's May 29, 2007 Opinion 25a
C. The District Court's April 28, 2006 Opinion 50a
D. The District Court's Order Substituting Gary N. Weintraub 93a
E. The Second Circuit's Order Denying Rehearing 95a

TABLE OF AUTHORITIES

Page(s)

CASES

Abdur-Rahman v. *Walker*,
567 F.3d 1278 (11th Cir. 2009) 10

Alaska v. *EEOC*,
564 F.3d 1062 (9th Cir. 2009) 12, 13, 14, 15

Andrew v. *Clark*, 561 F.3d 261 (4th Cir. 2009) 11

Anthoine v. *N. Cent. Counties Consortium*,
605 F.3d 740 (9th Cir. 2010) 18

Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 18, 27

Brammer-Hoelter v. *Twin Peaks Charter Acad.*, 492 F.3d 1192 (10th Cir. 2007) 9, 17

Charles v. *Grief*, 522 F.3d 508 (5th Cir. 2008) 16

Chavez-Rodriguez v. *City of Santa Fe*,
596 F.3d 708 (10th Cir. 2010) 17

Connick v. *Myers*, 461 U.S. 138 (1983) 16

Davenport v. *Univ. of Arkansas Bd. of Trs.*,
553 F.3d 1110 (8th Cir. 2009) 11, 14

Davis v. *Cook County*,
534 F.3d 650 (7th Cir. 2008) 20

Davis v. *McKinney*,
518 F.3d 304 (5th Cir. 2008) 16

Densmore v. *City of Maywood*,
320 F. App'x 497 (9th Cir. 2008) 19

Eng v. *Cooley*,
552 F.3d 1062 (9th Cir. 2009) 13, 19

Fairley v. *Andrews*,
578 F.3d 518 (7th Cir. 2009) 14, 15

TABLE OF AUTHORITIES—continued

Page(s)

Foley v. *Town of Randolph*,
598 F.3d 1 (1st Cir. 2010) 10

Foraker v. *Chaffinch*,
501 F.3d 231 (3d Cir. 2007) 19

Fox v. *Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2010) 16, 20

Freitag v. *Ayers*,
468 F.3d 528 (9th Cir. 2006) 12, 13, 14

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) ..... *passim*

Givhan v. *Western Line Consolidated Sch. Dist.*, 439 U.S. 410 (1979) 6, 24

Glover v. *Mabrey*,
No. 08-7048, 2010 WL 2563032
(10th Cir. June 28, 2010) 17

Gorum v. *Sessoms*, 561 F.3d 179 (3d Cir. 2009).. 9, 10

Hesse v. *Town of Jackson*,
541 F.3d 1240 (10th Cir. 2008) 17

Huppert v. *City of Pittsburg*,
574 F.3d 696 (9th Cir. 2009) 19

Lee v. *York County Sch. Div.*,
484 F.3d 687 (4th Cir. 2007) 11

Lindsey v. *City of Orrick*,
491 F.3d 892 (8th Cir. 2007) 12, 14

Marable v. *Nichtman*,
511 F.3d 924 (9th Cir. 2007) 19

Miller v. *Fenton*, 474 U.S. 104 (1985) 18

Pickering v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) 1, 21, 22

TABLE OF AUTHORITIES—continued

Page(s)

Posey v. *Lake Pend Oreille Sch. Dist. No. 84*,
546 F.3d 1121 (9th Cir. 2008) 16, 18, 27

Reilly v. *City of Atlantic City*,
532 F.3d 216 (3d Cir. 2008) 19

Robinson v. *York*,
566 F.3d 817 (9th Cir. 2009) 18, 19

Rohrbough v. *Univ. of Colo. Hosp. Auth.*,
596 F.3d 741 (10th Cir. 2010) 9, 17

Swearnigen-El v. *Cook County Sheriff's Dep't*,
602 F.3d 852 (7th Cir. 2010) 10

Weisbarth v. *Geauga Park Dist.*,
499 F.3d 538 (6th Cir. 2007) 10

Wilburn v. *Robinson*,
480 F.3d 1140 (D.C. Cir. 2007) 17

Williams v. *Dallas Indep. Sch. Dist.*,
480 F.3d 689 (5th Cir. 2007) 8, 9, 14

Winder v. *Erste*,
566 F.3d 209 (D.C. Cir. 2009) 10

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 4, 5

MISCELLANEOUS

THE COMPACT OXFORD ENGLISH DICTIONARY
(2D ED. 1991) 25

WEBSTER'S THIRD NEW INTERNATIONAL
DICTIONARY (1986) 25

Richard R. Carlson, *Citizen Employees*,
70 La. L. Rev. 237 (2009) 28

TABLE OF AUTHORITIES—continued

Page(s)

Raj Chohan, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistleblowers*, 85 Denv. U. L. Rev. 573 (2008) 29

Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 Ky. L.J. 37 (2008) 28, 29

Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti *v.* Ceballos *on Public School Educators*, 17 B.U. Pub. Int. L.J. 209 (2008) 25, 28, 29

John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 Am. J. Trial Advoc. 539 (2007) 29

Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal* Employees, 7 First Amend. L. Rev. 117 (2008) 24, 29

Kathryn B. Cooper, Casenote, Garcetti *v.* Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 Loy. J. Pub. Int. L., 73 (2006) 25

Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?* Garcetti *v.* Ceballos *and the 'Citizenship' Prong to the* Pickering/Connick *Protected Speech Test*, 52 St. Louis U. L.J. 589 (2008) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gary N. Weintraub, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–24a) is reported at 593 F.3d 196. The May 29, 2007 opinion of the district court (App., *infra*, 25a–49a) is reported at 489 F. Supp. 2d 209. And the April 28, 2006 opinion of the district court (App., *infra*, 50a–92a) is reported at 423 F. Supp. 2d 38.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2010. The order denying the petition for rehearing was entered on April 12, 2010. App., *infra*, 95a–96a. On June 21, 2010, Justice Ginsburg extended the time for filing the petition for a writ of certiorari to August 11, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This petition presents two deep and intractable circuit splits over important and recurring questions concerning the First Amendment rights of public employees. As this Court has repeatedly held, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006); see also *Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). In *Garcetti*, this Court held that a public employee who engages in speech "pursuant to"

his official duties cannot invoke the protection of the First Amendment to insulate his speech from employer discipline. However, this Court left open the questions of when an employee speaks "pursuant to" his official duties, and whether that inquiry is a mixed question of law and fact properly reserved for a jury or a pure question of law appropriate for summary judgment.

Here, the Second Circuit held that a public school teacher acted pursuant to his official duties when he petitioned an independent union to file a grievance concerning an assistant principal's repeated failures to discipline a physically abusive student. The Second Circuit's decision is consistent with decisions in the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, holding that a public employee speaks "pursuant to" official duties whenever speech is loosely "related to" those duties. However, the Second Circuit's decision is fundamentally incompatible with decisions in the Eighth and Ninth Circuits holding that only speech that is required by a public employer is unprotected under *Garcetti*. In these circuits, speech voluntarily engaged in by an employee, even if related to job responsibilities, remains protected.

The Second Circuit also deepened a second circuit split by affirming the entry of summary judgment on the question whether the public school teacher's petition for a grievance was pursuant to his official duties. The Second Circuit's decision is consistent with the positions of the Fifth, Tenth, and D.C. Circuits, which have treated this question as a question of law. But the decision is at loggerheads with the Third, Seventh and Ninth Circuits, which

regard the question as a mixed question of law and fact.

Petitioner seeks this Court's intervention to resolve these conflicting lines of authority, correct the Second Circuit's erroneous application of *Garcetti*, and clarify *Garcetti*'s standard for public employee First Amendment claims.

A. Factual Background

David H. Weintraub was a new fifth-grade teacher at P.S. 274, a public school in Brooklyn, New York. On November 6, 1998, a student threw a book at him during class. Mr. Weintraub immediately sent the student to the Assistant Principal's office, but the Assistant Principal sent the student back to class without discipline. The very next school day, the student threw several more books at him. Mr. Weintraub again sent student to the Assistant Principal's office, and the Assistant Principal again failed to discipline the student. App., *infra*, 3a.

Mr. Weintraub raised his concerns regarding this failure to discipline the student privately with the Assistant Principal, and he notified the Assistant Principal that he planned to petition the teachers' union to file a grievance if the Assistant Principal did not fulfill his responsibilities and take disciplinary action. Mr. Weintraub also communicated his concerns, including his intent to file a grievance petition, to fellow teachers. When the Assistant Principal persisted in his steadfast refusal to discipline the student, Mr. Weintraub petitioned the union to file the grievance. App., *infra*, 3a–4a.

As a result of his grievance petition, Mr. Weintraub was subjected to a vicious retaliatory campaign by the Assistant Principal and his colleagues. Mr.

Weintraub received unfounded negative evaluations. He was wrongfully accused of sexually abusing a student. He was accused of abandoning his class. And, he was falsely accused of an attempted assault of another teacher, resulting in his arrest. Despite clear and repeated determinations that all of these allegations were unfounded, Mr. Weintraub was ultimately fired from his job as a public school teacher. *Id.* at 4a, 53a–62a.

B. Procedural Background

On July 28, 2000, Mr. Weintraub commenced this action in the Eastern District of New York against the Board of Education of the City of New York, Community School District 32, the City of New York, and several individual defendants, alleging retaliatory adverse employment action in violation of his First Amendment rights; and false arrest and malicious prosecution in violation of state law, the Fourth Amendment of the Constitution, and 42 U.S.C. § 1983. App., *infra*, 50a–51a. Defendants moved for summary judgment.

1. On April 28, 2006, the district court issued an opinion denying defendants' motion for summary judgment on Mr. Weintraub's First Amendment retaliatory action claim. App., *infra,* 68a–75a. "Considering the content, context, and form of Weintraub's speech, in light of all of the facts disclosed by the record, the Court [found] that Weintraub's complaint to [Assistant Principal] Goodman and subsequent grievance were protected by the First Amendment." *Id.* at 73a. Specifically, the district court found that Mr. Weintraub spoke on a matter of public concern—classroom discipline—and that a "jury could infer that Goodman initially intended to punish Weintraub for his speech with minimal retaliatory action,

but when Weintraub was vindicated against each improper act, a more egregious action followed in furtherance of Goodman's improper motive." *Id.* at 72–74a. Thus, the court found sufficient disputed material facts to survive summary judgment.

2. After this Court issued its *Garcetti* decision, defendants moved for reconsideration of the district court's order denying summary judgment. App., *infra*, 28a. Upon reconsideration, the district court held that "*Garcetti* precludes Weintraub's § 1983 claim, to the extent that that claim is based on Weintraub's private conversation with Goodman and his formal grievance," and permitted Weintraub's claim only to the extent that it was based on his conversations with other teachers. *Id.* at 45a–46a. However, in recognition of the fact that "supererogatory nature of [his] * * * actions may prove sufficient to sustain the view that Weintraub was not acting pursuant to any duty when he performed those actions," the district court encouraged interlocutory appeal. *Id.* at 47a–48a.

3. The Second Circuit accepted the case for interlocutory review and, in a 2-1 decision, affirmed the district court's grant of summary judgment. Writing for the court, Judge Walker opined that Mr. Weintraub's grievance petition was filed "pursuant to" his official duties, "because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' * * * as a public school teacher." App., *infra*, 12a. In reaching this conclusion, the majority emphasized that "[t]he lodging of a union grievance is not a form or channel of discourse available to non-employee citizens." *Id.* at 14a. Thus, the majority held that "because Weintraub made his statements 'pursuant to' his official duties as a schoolteacher, he

was 'not speaking as [a] citizen[ ] for First Amendment purposes.'" *Id.* at 16a (quoting *Garcetti*, 547 U.S. at 421).

Judge Calabresi filed a dissenting opinion criticizing the majority's "expansive reading" of *Garcetti*. App., *infra*, 16a–24a. Judge Calabresi wrote that the "majority's first prong, which looks to whether speech is 'in furtherance of' an employee's 'core duties,'" is too broad because it "could be read to imply that * * * classroom teachers receive no First Amendment protection anytime they speak on matters that implicate * * * speech on a wide variety of topics." *Id.* at 17a. Judge Calabresi also noted that the "majority's second prong, which asks whether there is a 'relevant citizen analogue' to Weintraub's speech" stands in tension with this Court's decision in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). App., *infra*, 18a–20a. Judge Calabresi urged a rule that an "employee's speech is 'pursuant to official duties' when the employee is required to make such speech in the course of fulfilling his job duties." *Id.* at 22a. Finally, Judge Calabresi argued that the question was one that "should be explored on remand or put before a jury." *Id.* at 24a n.12.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Of Appeals Are Deeply Divided Over The Application Of *Garcetti* To Speech That Is Only Tangentially Related To An Employee's Official Duties.

In *Garcetti*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at

421. *Garcetti* concerned a deputy district attorney who wrote a memorandum to his superiors recommending that a case be dismissed. Because the parties did not dispute "that Ceballos wrote his disposition memo pursuant to his employment duties," this Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. In the absence of direct guidance, the lower courts have split over when an employee speaks "pursuant to" his official duties, and whether that inquiry is a mixed question of law and fact properly reserved for a jury or a pure question of law appropriate for summary judgment. This case is an excellent vehicle to resolve these intractable splits of authority and develop a framework to guide the lower courts.

A. The Courts Are Divided Over The Definition Of "Pursuant To" Under *Garcetti*.

The lower courts are irreconcilably divided over whether the reasoning of *Garcetti* applies only to speech "required" by a public employee's official duties or extends to all speech "stemming from" or "related to" those duties. The Second Circuit's decision in this case is consistent with decisions of the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits holding that a public employee speaks "pursuant to" official duties whenever speech is "related to" those duties. The Second Circuit's decision is at loggerheads with decisions in the Eighth and Ninth Circuits holding that only speech that is required by a public employer is unprotected under *Garcetti*.

1. The Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, And D.C. Circuits Define "Pursuant To" To Include All Speech That Facilitates Official Duties.

In deciding this case below, the Second Circuit held that Mr. Weintraub's voluntary act of petitioning an independent teachers' union to file a grievance was "'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' as a public school teacher—namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." App. *infra.*, 12a (citation omitted). Specifically, the court reasoned that Mr. "Weintraub's speech challenging the school administration's decision to not discipline a student in his class was a 'means to fulfill,' and 'undertaken in the course of performing,' his primary employment responsibility of teaching. *Ibid.* (citations omitted). The Second Circuit's approach is consistent with that of the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, which have adopted an expansive definition of the "pursuant to" standard that encompasses all speech that may be said to facilitate official duties.

In the Fifth Circuit, for example, "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (per curiam). *Williams* concerned a high school athletic director who wrote a letter to school officials addressing account abnormalities and an official's failure to provide account information. *Id.* at 690. The Fifth Circuit found that Williams "needed account information so that he could properly execute

his duties as Athletic Director, namely, taking the students to tournaments and paying their entry fees." *Id.* at 694. Thus, although the court explicitly recognized that the athletic director was not required to speak on the issue, it nevertheless held that the athletic director's complaint was "pursuant to" official duties because it was "part-and-parcel of his concerns about the program he ran." *Ibid.*

Similarly, the Tenth Circuit takes a "broad view of the meaning of speech that is pursuant to an employee's official duties." *Rohrbough* v. *Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010) (internal quotation marks omitted). There, speech not required of the employee is nevertheless denied protection if it "stem[s] from" the employee's job responsibilities, see *id.* at 746–747, or "reasonably contributes to or facilitates the employee's performance of the official duty," *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). In *Rohrbough*, the Tenth Circuit determined that a nurse's complaints to supervisors and other hospital personnel about a staffing crisis in the hospital were unprotected speech. 596 F.3d at 748. The court reasoned that the complaints were "within the scope of [the nurse's] official duties" because "the staffing crisis *affected* her ability to do her job and provide appropriate patient care." *Ibid.* (emphasis added).

The Third, Sixth, Seventh, Eleventh, and D.C. Circuits, as well, have adopted a broad reading of *Garcetti*, finding that an employee speaks "pursuant to" official duties if there is a colorable relationship between the speech and employment responsibilities. See, *e.g.*, *Gorum* v. *Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (professor who authored university disciplinary code acted "pursuant to" official duties when

he voluntarily assisted student in disciplinary proceedings because he possessed "'special knowledge' or 'experience' acquired through his job"); *Weisbarth* v. *Geauga Park Dist.*, 499 F.3d 538, 543 (6th Cir. 2007) (park ranger acted "pursuant to" official duties when she spoke candidly with outside consultant hired by her employer because conversation concerned personnel and morale problems in workplace and consultant had "official duty to interview" her); *Swearnigen-El* v. *Cook County Sheriff's Dep't*, 602 F.3d 852, 862 (7th Cir. 2010) (correctional officer spoke "pursuant to" official duties because he was on duty when he told supervisor he would "fight" supervisor's discriminatory efforts to remove all male officers from women's division of prison); *Abdur-Rahman* v. *Walker*, 567 F.3d 1278, 1284 (11th Cir. 2009) (scientists spoke "pursuant to" official duties when they reported that sewer spills were not being properly disclosed or remediated; although scientists were hired only to investigate *cause* of spills, and their complaints about disclosure and remediation were made voluntarily, their complaints "owed [their] existence" to official duties); *Winder* v. *Erste*, 566 F.3d 209, 214–216 (D.C. Cir. 2009) (manager hired to implement federal court orders on transportation of special-education students spoke "pursuant to" official duties when he testified before city council that his supervisors were interfering with implementation of orders).[1]

---

[1] The First and Fourth Circuits have interpreted *Garcetti*'s "pursuant to" standard in light of unique factual situations and legal postures. See *Foley* v. *Town of Randolph*, 598 F.3d 1, 7 (1st Cir. 2010) (fire chief who complained about staffing levels and funding in press conference at scene of fatal fire spoke "pursuant to" official duties in part because his boss, the Mas-

2. The Eighth And Ninth Circuits Define "Pursuant To" To Include Only Speech That Is Required By Official Duties.

In stark contrast with the circuits discussed above, the Eighth and Ninth Circuits interpret *Garcetti* narrowly, holding that a public employee's speech is denied First Amendment protection only if the employer *requires* the speech as part of the employee's job responsibilities.

In the Eighth Circuit, the "pursuant to" inquiry focuses on the specific requirements of an employee's job. In *Davenport* v. *University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), the plaintiff was a university security officer charged with patrolling the campus, supervising other officers, developing firearms training, and investigating crime. *Id.* at 1112. The plaintiff suffered retaliation at the hands of his supervisor, the chief of security, when he complained to university officials about his supervisor's misuse of resources and about a lack of equipment, uniforms, and parking available to security officers. *Ibid.* The court found that the plaintiff's "duties did not include reporting either wrongdoing by a superior officer or a lack of resources" and that his complaint was therefore protected by the First Amendment. *Id.* at 1113.

---

sachusetts State Fire Marshal, convened press conference); *Andrew* v. *Clark*, 561 F.3d 261, 267–268 (4th Cir. 2009) (reversing district court's dismissal of First Amendment claim because whether plaintiff "had an official responsibility to submit a [certain] memorandum" was subject of "serious debate"); *Lee* v. *York County Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (applying pre-*Garcetti-Pickering* standard because "[t]he Court [in *Garcetti*] explicitly did not decide whether th[e *Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching").

Similarly, in *Lindsey* v. *City of Orrick*, 491 F.3d 892 (8th Cir. 2007), the plaintiff was a city public works director charged with maintaining the city's parks, sewers, and streets. *Id.* at 895. As part of his job responsibilities, he was required to attend meetings of the city council to report on public works issues and, in 2003, was required to attend a training session on the state's open meetings (or "sunshine") law. *Id.* at 895–896. Later, when he began raising concerns at city council meetings that the council was not complying with the sunshine law and suggested that he would bring the matter to the attention of state officials, he was fired. *Id.* at 896. The Eighth Circuit recognized that the plaintiff's job duties included attendance at city council meetings and the sunshine law training session. See *id.* at 898. However, his duties did not require him to ensure the city's compliance with the sunshine law. *Ibid.* Accordingly, his complaints to the council were not "pursuant to" his official duties and were thus protected. See *ibid.*

The Ninth Circuit shares this focus on job requirements and has expressly held that, unless official duties require an employee to speak out, the speech is protected. In *Alaska* v. *EEOC*, a public employee convened a press conference to support a fellow employee's allegations of sexual harassment against the Alaska governor's office. 564 F.3d 1062, 1069 (9th Cir. 2009), cert. denied, 130 S. Ct. 1054 (2010). In *Freitag* v. *Ayers*, a female corrections officer complained to a state legislator and the state inspector general concerning prison officials' failure to respond to her complaints about inmate sexual harassment. 468 F.3d 528, 535 (9th Cir. 2006). In each case, the court found that the employee's speech was not "pursuant to" her official duties because "official

duties didn't require her to complain." *Alaska*, 564 F.3d at 1070; see *Freitag*, 468 F.3d at 545 ("It was certainly not part of [the employee's] official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly."); see also *Eng* v. *Cooley*, 552 F.3d 1062, 1073 (9th Cir. 2009) (if apparent on remand that employee "had no official duty to complain," his speech is protected), cert. denied, 130 S. Ct. 1047 (2010).[2]

3. Mr. Weintraub Would Have Obtained A Different Result If He Had Been Employed Within The Jurisdiction Of The Eighth Or Ninth Circuits.

If Mr. Weintraub had taught fifth grade in a public school system in any of the 16 states within the jurisdiction of the Eighth or Ninth Circuits rather than the Second Circuit, he would have obtained a

---

[2] Although the majority below purported to rely on *Freitag* v. *Ayers*, Judge Calabresi aptly noted that *Freitag* does not "support[] the majority's conclusion." See App., *infra*, 24a n.12. In *Freitag*, the Ninth Circuit found that internal reports were not protected because "Freitag submitted those reports pursuant to her official duties as a correctional officer"; however, the court found that complaints to a state legislator and the Inspector General were protected because"[i]t was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly." 468 F.3d at 545–546. The court also denied summary judgment regarding Freitag's complaint to the director of the California Department of Corrections and Rehabilitation because it was "unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR at the state capitol in Sacramento." *Id.* at 546. There is no evidence that Mr. Weintraub's external grievance petition was part of his official tasks; therefore, under the *Freitag* decision, summary judgment was improper.

different result. Mr. Weintraub voiced concerns to an independent teachers' union about his supervisor's repeated failures to impose proper discipline in his school. Like the employees in *Davenport*, *Lindsey*, *Alaska*, and *Freitag*, he was in no way *required* to engage in the disputed speech. Accordingly, under the established precedents in both the Eighth and Ninth Circuits, his speech was not "pursuant to" his official duties because his "official duties didn't require [him] to complain," *Alaska*, 564 F.3d at 1070, and he could sue to seek redress for the retaliation that he endured.

The Eighth and Ninth Circuit decisions limiting *Garcetti* to speech specifically "*required*" by official duties are fundamentally inconsistent with the Second Circuit's decision. Rather than limiting *Garcetti* to to speech specifically "*required*," the Second Circuit relied on the Fifth Circuit's loose formulation in *Williams* to conclude that Mr. Weintraub's grievance petition to the teachers' union was speech "pursuant to" official duties because it "was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' * * * as a public school teacher." App., *infra*, 12a (quoting *Williams*, 480 F.3d at 694). The Second Circuit's decision cannot be reconciled with the decisions in the Eighth and Ninth Circuits because Mr. Weintraub was under no official obligation to petition for a formal grievance with his independent union.

Indeed, the Seventh Circuit has recognized that public employees raising First Amendment claims may obtain different results depending on the jurisdiction in which they are employed. In *Fairley* v. *Andrews*, two Illinois state prison guards were subjected to retaliation for exposing their peers' mi-

streatment of prisoners. 578 F.3d 518, 520–521 (7th Cir. 2009), cert. denied, 130 S. Ct. 3320 (2010). Judge Easterbrook noted that the Ninth Circuit's understanding of *Garcetti* supported the guards' First Amendment claims because, in the Ninth Circuit, "*Garcetti* does not apply unless the employer has officially assigned to the employee a task of making *particular* speech, requiring the worker to act precisely as she did." *Id.* at 523. However, Judge Easterbrook declined to endorse this reading, asserting that "*Garcetti* is not limited to tasks officially assigned to an employee." *Ibid.* "We disapprove *Alaska* v. *EEOC*, [564 F.3d 1062 (9th Cir. 2009)]," he wrote, "to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer." *Ibid.*

Judge Easterbrook's opinion highlights the circuit split over *Garcetti*. Simply put, the Eighth and Ninth Circuits—which encompass a substantial portion of the Nation's federal district courts and population—interpret "pursuant to" to mean "required by," while the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits think "pursuant to" means "related to." This rift has created a patchwork of inconsistent speech protections tied to the geographic location of an employee's job—and it is a rift that only this Court can mend.

B. The Courts Are Divided Over Whether The "Pursuant To" Standard Presents A Question Of Law Or A Mixed Question Of Law And Fact.

In addition to the substantive split outlined above, the circuits are irreconcilably divided over whether to analyze *Garcetti*'s "pursuant to" standard as a question of law or as a mixed question of law

and fact. See, *e.g.*, *Fox* v. *Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010) ("[T]he circuits are divided over 'whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick* [v. *Myers*, 461 U.S. 138 (1983)], or if instead *Garcetti* has transformed it into a mixed question of fact and law.'"); *Posey* v. *Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("Our sister circuits are split over the resolution of this question.").

1. The Fifth, Tenth, And D.C. Circuits Regard The "Pursuant To" Standard As A Question Of Law.

On one side of the split, the Fifth, Tenth, and D.C. Circuits treat the determination of whether a government employee acted pursuant to his official duties as a question of law.

For example, in *Charles* v. *Grief*, 522 F.3d 508 (5th Cir. 2008), the Fifth Circuit rejected a magistrate judge's recommendation that the "question whether Charles's statements were made in his capacity as a concerned citizen or as a Commission employee is a material issue of genuine fact properly resolved at trial." *Id.* at 513 n.17 (internal quotation marks omitted). The court reasoned that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Ibid.*; see also *Davis* v. *McKinney*, 518 F.3d 304, 315 (5th Cir. 2008) ("[T]he question of whether a communication is made as an employee or as a citizen is a question of law.").

The Tenth and D.C. Circuits reached the same conclusion without analysis in several recent cases. In *Brammer-Hoelter*, 492 F.3d at 1203, the Tenth Circuit held that "[t]he first three steps" of the inquiry into the protected status of speech, including the determination whether the employee has spoken pursuant to his official duties, "are to be resolved by the district court * * * [and not] the trier of fact." See also *Rohrbough*, 596 F.3d at 746 ("'The determination of whether a public employee speaks pursuant to official duties is a matter of law.'"); *Chavez-Rodriguez* v. *City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010) (same); *Hesse* v. *Town of Jackson*, 541 F.3d 1240, 1249 (10th Cir. 2008) (same); *Glover* v. *Mabrey*, No. 08-7048, 2010 WL 2563032, at *4 n.4 (10th Cir. June 28, 2010) (same). Similarly, in *Wilburn* v. *Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (internal quotation marks omitted), the D.C. Circuit held that the question whether a plaintiff "ha[s] spoken as a citizen on a matter of public concern" is a "question[ ] of law for the court to resolve," and not a "question[ ] of fact ordinarily for the jury."

Here, the Second Circuit joined the Fifth, Tenth, and D.C. Circuits by finding that the "pursuant to" inquiry is a question of law appropriate for summary judgment despite disputed facts regarding the scope of Mr. Weintraub's official duties. See App., *infra*, 16a.

2. The Third, Seventh, And Ninth Circuits Regard The "Pursuant To" Standard As A Mixed Question Of Law And Fact.

In direct conflict with the Second, Fifth, Tenth and D.C. Circuits, the Third, Seventh, and Ninth Circuits have held that "pursuant to" inquiry presents a mixed question of law and fact.

For example, in *Posey*, 546 F.3d at 1129, the Ninth Circuit held that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." The Court reasoned that "[f]acts that can be 'found' by 'application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact.'" *Ibid.* (quoting *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984)). And "[t]he *Garcetti* Court itself seems to have anticipated as much when it explained that '[t]he proper inquiry is a practical one,' requiring more than mere mechanical reference to '[f]ormal job descriptions[, which] often bear little resemblance to the duties an employee actually is expected to perform.'" *Ibid.* (quoting *Garcetti*, 547 U.S. at 424–425). Thus, the Ninth Circuit concluded that "[b]ecause the task of determining the scope of a plaintiff's job responsibilities is concrete and practical rather than abstract and formal, * * * a factual determination of a plaintiff's job responsibilities will not encroach upon the court's prerogative to interpret and apply the relevant legal rules."[3] *Ibid.*

The Ninth Circuit has since expressly reaffirmed *Posey* in several published decisions. See, *e.g.*, *Anthoine* v. *N. Cent. Counties Consortium*, 605 F.3d 740, 749 (9th Cir. 2010) ("'[W]hether the plaintiff spoke as a public employee or a private citizen[ ] is a mixed question of fact and law.'"); *Robinson* v. *York*, 566 F.3d 817, 823–824 (9th Cir. 2009) ("'[W]hen

---

[3] As the Ninth Circuit noted, this Court has held that "'[a]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.'" *Posey*, 546 F.3d at 1129 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985)).

there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment . . . until after the fact finding process.'"); *Eng*, 552 F.3d at 1071 ("While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found' is a question of law."); *Densmore* v. *City of Maywood*, 320 F. App'x 497, 499 (9th Cir. 2008). However, the court has addressed the question on summary judgment where the material facts are not in dispute. See *Huppert* v. *City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009) (finding that "any speech Huppert gave during his grand jury testimony was 'pursuant to his duties as a [police officer],'" as a matter of law); *Marable* v. *Nichtman*, 511 F.3d 924, 932 (9th Cir. 2007) (finding that "it cannot be disputed that [plaintiff's] job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials").

The Third Circuit reached the same conclusion in *Reilly* v. *City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008), cert. denied, 129 S. Ct. 1316 (2009). The court reasoned that "[i]n *Garcetti*, the Supreme Court described the inquiry into whether the plaintiff spoke pursuant to his official duties as 'a practical one,' noting that '[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform.'" *Ibid.* (quoting *Garcetti*, 547 U.S. at 424–425). Therefore, the Third Circuit held that "'whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.'" *Ibid.* (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)).

Finally, the Seventh Circuit has implicitly sided with the Third and Ninth Circuit. In *Davis* v. *Cook County*, 534 F.3d 650 (7th Cir. 2008), the Seventh Circuit held that summary judgment was appropriate because "no rational trier of fact could find" that Davis's speech had been made in her capacity as a private citizen. *Id.* at 653. By approaching this issue from the standpoint of the jury, the *Davis* court tacitly endorsed treating the "pursuant to" inquiry as a mixed question of law and fact. See also *Fox*, 605 F.3d at 351 ("Even if the question were purely a question of fact * * * the district court properly granted summary judgment because the factual record presents no genuine issue for trial.").

3. Mr. Weintraub Might Have Obtained A Different Result If His Case Were Litigated In The Third, Seventh, Or Ninth Circuits.

If Mr. Weintraub had litigated this case in the Third, Seventh, or Ninth Circuits, he could have obtained a different result. Given that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform" (*Garcetti*, 547 U.S. at 424–425), the Third, Seventh, and Ninth Circuits would have remanded this case for factual determinations of Mr. Weintraub's official duties and the relationship between his official duties and the independent union's grievance procedure. Thus, the question whether genuine issues of material fact can survive summary judgment turns on nothing more than the jurisdiction in which cases are litigated. This Court's intervention is accordingly warranted.

II. Review Is Also Warranted Because the Decision Below Is Wrong.

For decades, this Court has unequivocally held that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Indeed, this Court has explicitly recognized that "it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. Although *Garcetti* carved out a narrow exception to *Pickering* for speech made "pursuant to" official duties, the Second Circuit erred by interpreting that narrow exception to swallow the well established rule that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Id.* at 568.

As a threshold matter, the "pursuant to" standard articulated in *Garcetti* dictates a limited category of unprotected speech. The *Garcetti* decision explicitly states that "public employees do not surrender all their First Amendment rights by reason of their employment," 547 U.S. at 417, and it cautions courts against circumscribing those rights too narrowly. Accordingly, "[s]o long as employees are speaking as citizens about matters of public concern," this Court wrote, "they must face *only those speech restrictions that are necessary for their employers to operate efficiently and effectively*." *Id.* at 419 (emphasis added).[4]

---

[4] In this case, there is no dispute that petitioner's speech pertained to a matter of "public concern."

Driving home the point, this Court made two observations. First, it emphasized that speech communicated "at work" may be entitled to First Amendment protection. See *id.* at 420. As this Court noted, "[m]any citizens do much of their talking inside their respective workplaces." *Ibid.* Thus, to find such speech automatically unprotected "would not serve the goal of treating public employees like 'any member of the general public.'" *Id.* at 420–421 (quoting *Pickering*, 391 U.S. at 573). Second, this Court pointed out that employee speech does not shed constitutional protections simply because it pertains to the "subject matter" of employment. *Id.* at 421. The decision explicitly recognized that "[t]he First Amendment protects some expressions *related to* the speaker's job." *Ibid.* (emphasis added).

Thus, under *Garcetti*, workplace speech related to a speaker's job is not automatically beyond the protection of the First Amendment. To come within *Garcetti*'s narrow exception, the speech must be undertaken "pursuant to" the speaker's job duties. Rather than recognizing this critical distinction, the Second Circuit engaged in an expansive reading of *Garcetti* that threatens to chill constitutionally protected speech. Moreover, the Second Circuit improperly treated the "pursuant to" inquiry as a question of law.

A. The Second Circuit's Construction Of The "Pursuant To" Standard Is Unworkable And Inconsistent With This Court's Precedents.

As Judge Calabresi's dissent explained, the Second Circuit's opinion creates an unworkable construction of the "pursuant to" standard that turns the reasoning of *Garcetti* on its head. See App., *infra*,

16a–24a (Calabresi, J., dissenting). The majority found Mr. Weintraub's speech unprotected because 1) it was "in furtherance of" his "core duties" as a teacher, and 2) it had "no relevant citizen analogue." *Id.* at 12a–13a. That standard broadens *Garcetti*'s narrow holding, is hopelessly vague, and conflicts with this Court's precedents.

First, the majority piled inference upon inference to arrive at the conclusion that the act of filing a voluntary grievance petition was somehow pursuant to "core duties" as a school teacher: "effective teaching and classroom learning." See App., *infra*, 12a. At bottom, the Second Circuit's reasoning amounts to nothing more than the observation that the subject matter of Mr. Weintraub's speech was related to his job, which this Court explicitly found to be insufficient in *Garcetti*, 547 U.S. at 421. The logic of the Second Circuit's bootstrapping argument would transform nearly all workplace expression into speech "pursuant to" official duties. As Judge Calabresi observed in dissent,

> the prerequisites for effective learning are broad and contentious; everything from a healthy diet to a two-parent family has been suggested to be necessary for effective classroom learning, and hence speech on a wide variety of topics might all too readily [under the majority's reasoning] be viewed as "in furtherance of" the core duty of encouraging effective teaching and learning.

See App., *infra*, 17a (Calabresi, J., dissenting).

Second, the majority disregarded this Court's precedents by relying heavily on the fact there was "no relevant citizen analogue" for Mr. Weintraub's

speech because "[t]he lodging of a union grievance is not a form or channel of discourse available to non-employee citizens." See App., *infra*, 13a–14a. Although the *Garcetti* decision noted as non-dispositive the fact that a public employee "expressed his views inside his office, rather than publicly," 547 U.S. at 420, "[t]his Court's decisions * * * do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979). If, as *Garcetti* declares, "[e]mployees * * * may receive First Amendment protection for expressions made at work," 547 U.S. at 420, then "*some* speech that is not 'through channels available to citizens at large' must be free from retaliation." App., *infra*, 19a (Calabresi, J., dissenting). The majority's refusal even to attempt to draw a principled line stands in direct conflict with this Court's prior rulings. See *id.* at 19a–20a.

Moreover, the majority's "citizen analogue" inquiry creates a perverse incentive for public employees wishing to voice their legitimate concerns. The ultimate goal of *Garcetti* was to promote efficient governance. 547 U.S. at 417, 420. However, by reducing constitutional protections for complaints made either internally or through unions and by suggesting that whistleblowers should resort directly to the press to air their grievances with their government employers, App., *infra*, 13a–14a, the decision below encourages employees to go public with their complaints. The decision thus heightens the likelihood that internal governmental disputes will be fought in public forums. See Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal* Employees, 7 First Amend. L. Rev. 117, 127

(2008); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti *v.* Ceballos *on Public School Educators*, 17 B.U. Pub. Int. L.J. 209, 209, 231 (2008); see also Kathryn B. Cooper, Casenote, Garcetti *v.* Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 Loy. J. Pub. Int. L., 73, 91 (2006); Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?* Garcetti *v.* Ceballos *and the 'Citizenship' Prong to the* Pickering/Connick *Protected Speech Test*, 52 St. Louis U. L.J. 589, 625 (2008).

Finally, the majority decision fundamentally misinterpreted this Court's caution in *Garcetti* that employers could not restrict employee free speech rights by crafting "excessively broad job descriptions," emphasizing that "[t]he proper inquiry is a practical one." *Garcetti*, 547 U.S. at 424. The majority's decision read that language as a warning to courts not to "construe[] a government employee's official duties too narrowly," App., *infra*, 10a, when this Court clearly intended just the opposite, *Garcetti*, 547 U.S. at 424. The Court should take this opportunity to correct the Second Circuit's misunderstanding and clarify *Garcetti* for the lower courts. Because the "pursuant to" standard carves out only a limited category of unprotected speech, it is best given effect by an analysis of what an employee's job *actually requires* of him or her.[5] As Judge Calabresi explained:

---

[5] Indeed, a test that looks to a job's actual requirements seems compelled by the *Garcetti* Court's focus on "official *duties*." See THE COMPACT OXFORD ENGLISH DICTIONARY 487 (2d ed. 1991) (defining duty as "action which one's position or station *directly requires*") (emphasis added); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 705 (1986) (defining duty as "*obligatory*

> [T]he scope of *Garcetti* [should] be coextensive with its prime concerns and [should] go no further. An employee's speech is "pursuant to official duties" when the employee is required to make such speech in the course of fulfilling his job duties. * * * [I]t must be possible to say that the employer has "commissioned or created" the speech * * *—that the employer in some way *relies* on the speech made by the employee, as where the speech is an "official communications" or is used by the employer to "promote the employer's mission."

App., *infra*, 22a (Calabresi, J., dissenting). The majority's overbroad definition the "pursuant to" standard, misapplication of this Court's prior precedents, and misinterpretation of *Garcetti* warrant review.

B. The Decision Below Improperly Affirms The District Court's Treatment Of The "Pursuant To" Standard As A Question Of Law.

The Second Circuit improperly affirmed the district court's treatment of the "pursuant to" standard as a question of law, rather than a mixed question of law and fact reserved for a jury. As the Court noted in *Garcetti*, the determination of whether a given speech act is "pursuant to" an employee's official duties is a "practical one," in which no particular fact or configuration of facts is dispositive. *Garcetti*, 547 U.S. at 424. Thus, this "practical" inquiry requires consideration of many factual particularities that differ on a case-by-case basis. And facts that can be

---

tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession") (emphasis added).

"found" by "application of * * * ordinary principles of logic and common experience * * * are ordinarily entrusted to the finder of fact." *Bose Corp.*, 466 U.S. at 501 n.17. Accordingly, this Court should grant review and clarify that the "pursuant to" standard presents a mixed question of fact and law that requires a factual determination of the scope and content of a plaintiff's job responsibilities. See, *e.g.*, *Posey*, 546 F.3d at 1129.

III. This Case Presents An Issue Of Great Importance.

In the four years since *Garcetti* was decided, the federal district courts have issued more than 630 decisions discussing the "pursuant to" standard—an average of more than 150 cases per year. A substantial portion of those decisions has been appealed, with more than 130 cases litigated in the courts of appeals since May 2006. Given the high volume of litigation surrounding this standard, the federal courts can anticipate a substantial *Garcetti*-related caseload for the foreseeable future, a caseload that will produce arbitrary differences in outcomes due to jurisdictional happenstance as a result of the confusion over the procedural and substantive aspects of *Garcetti*'s "pursuant to" standard.

The volume of litigation activity surrounding the "pursuant to" standard reflects not only the sheer size of the governmental workforce, but also the crucial stakes implicated by *Garcetti* and its progeny. If left uncorrected, the decision below and the decisions of the circuits with which it is aligned will have a negative impact on the enterprise of public education and government institutions more broadly.

Most immediately, the Second Circuit's opinion threatens to chill the speech of any teacher who would raise a grievance regarding disciplinary or pedagogical issues. See McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 235. Indeed, the decision below removes longstanding constitutional protections against retaliation and forces teachers to rely on a complicated, non-comprehensive matrix of federal and state anti-retaliation statutes and common law precedents. See Richard R. Carlson, *Citizen Employees*, 70 La. L. Rev. 237, 243 (2009) ("[W]hile the number and variety of laws protecting citizen employees seems impressive, these laws form an incomplete, inconsistent, and unreliable patchwork. There is no master anti-retaliation law on the order of Title VII to fill the gaps, either at the federal level or in any but a few states. A citizen employee's protection against retaliation and interference depends as much on the luck of geography, occupation, and the law the employer violated as on the merits of the employee's conduct or the value of his action to the community."); see also *id.* at 276–278; McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 232–233; Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 Ky. L.J. 37, 75 (2008).[6] In the face of this complex

---

[6] The work of these scholars confirms concerns raised by Justice Souter in his *Garcetti* dissent. See *Garcetti*, 547 U.S. at 440–441 (Souter, J., dissenting) (cataloging inconsistent federal and state anti-retaliation laws and noting that "individuals doing the same sort of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them").

maze of anti-retaliation law, teachers cannot speak with confidence that their speech will be protected.

To the extent that the Second Circuit's decision chills the speech of teachers on legitimate disciplinary issues, it threatens to undermine the safety of school children. See Hutchens, 97 Ky. L.J. at 49. As the Second Circuit noted, an orderly classroom is "an indispensable prerequisite to effective teaching and classroom learning,'" App., *infra* 17a, and classroom discipline will undoubtedly be threatened if teachers are afraid to challenge decisions made by school administrators on disciplinary issues.

Moreover, the Second Circuit's decision potentially reaches beyond the public school setting to include all government employees and government institutions. The decision's chilling effect is not limited to teachers; it threatens to chill the speech of any public employee who challenges misguided or malfeasant conduct by co-workers. See McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 230; Secunda, 7 First Amend. L. Rev. at 118; see also Raj Chohan, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistleblowers*, 85 Denv. U. L. Rev. 573, 593 (2008). By sheltering retaliators, the decision dramatically reduces the incentives of government regulators, public administrators, police officers, and others to report misconduct and malfeasance in their workplaces, with the ultimate costs accruing to citizens in the form of substandard services, unchecked corruption, fraud, and abuse. See John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 Am. J. Trial Advoc. 539, 563 (2007); see also Chohan, 85 Denv. U. L. Rev. at 593.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC
20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

AUGUST 2010

APPENDIX A

UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

David H. WEINTRAUB,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Community School District 32, City of New York, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano, Lawrence Becker, Jerry Cioffi,

Respondents-Appellees.

No. 07-2376-cv
Argued: Nov. 25, 2008
Decided: Jan. 27, 2010

Before: JACOBS, Chief Judge, WALKER, and CALABRESI, Circuit Judges.

Judge CALABRESI dissents in a separate opinion.

JOHN M. WALKER, JR., Circuit Judge:

Petitioner-Appellant David H. Weintraub, a former New York City public school teacher, appeals from an order of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*), *inter alia*, dismissing his First Amendment employment retaliation claim against Respondents-

Appellees the Board of Education of the City School District of the City of New York, Community School District 32, the City of New York, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano, Lawrence Becker, and Jerry Cioffi (collectively, "Defendants"). Weintraub alleged that Defendants violated his First Amendment rights by retaliating against him for filing a formal grievance with his union that challenged the school assistant principal's decision not to discipline a student who had thrown books at Weintraub during class. The district court dismissed Weintraub's claim in light of *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), which held that the First Amendment does not protect speech made pursuant to a public employee's official duties.

We find that Weintraub's filing of the grievance was in furtherance of one of his core duties as a public school teacher, maintaining class discipline, and had no relevant analogue to citizen speech. Accordingly, we conclude that, under *Garcetti*, 547 U.S. at 421-24, Weintraub filed the grievance "pursuant to [his] official duties," and thus, not as a citizen for purposes of the First Amendment. The grievance, therefore, is not protected speech, and we affirm the district court's dismissal of Weintraub's retaliation claim.

BACKGROUND

The underlying facts and procedural history of this case are detailed in the district court's April 28, 2006 opinion that granted in part and denied in part Defendants' motion for summary judgment. *See Weintraub* v. *Bd. of Educ. of City of N.Y.*, 423 F. Supp. 2d 38, 42-48 (E.D.N.Y. 2006) ("*Weintraub I*"). We set forth below only such facts as are relevant to this appeal.

IV. Underlying Events

In September 1998, Weintraub began teaching fifth grade at P.S. 274, a public school in Brooklyn, New York. During his first two months, there were no apparent problems in his class, with his performance, or between Weintraub and school administrators.

On Friday, November 6, 1998, after a student threw a book at him during class, Weintraub referred the student to his immediate supervisor, Assistant Principal Douglas Goodman. Shortly thereafter, Goodman returned the student to Weintraub's classroom. The next school day, the same student threw additional books at Weintraub. Weintraub again referred the student to Goodman, who returned the student to Weintraub's class.

Weintraub was "upset" by Goodman's decision not to discipline the student and concerned that "if this child could do this to [Weintraub], . . . it would put the . . . other students at risk." (Pl.'s Dep. 51:17-19, Jul. 19, 2002.) Weintraub subsequently learned that the same student "put a kid in the hospital later in the year." (Pl.'s Dep. 51:20-21, 23-25.) After the second book-throwing incident, Weintraub told Goodman, "If nothing is going to be done, I [will] have to file a grievance with the union to have something done about this because [the student] should be suspended for this," (Pl.'s Dep. 43:3-6), and "it is not an environment a teacher would want to go to where a child is allowed to throw a book at teachers," (Pl.'s Dep. 47:10-12). Weintraub also "understood" that under "citywide Board of Education policy . . . a student assaulting the teacher in 5th grade . . . should have been suspended." (Pl.'s Dep. 44:3-6.) Weintraub told other teachers at P.S. 274 about the

incidents and his intention to file a grievance, and then filed the grievance with his union representative.

Weintraub alleges that because of his complaints, including his grievance, Goodman and other school officials retaliated against him through "acts of intimidation, harassment, workplace abuse, and deliberate attempts to undermine [his] authority." *Weintraub I*, 423 F. Supp. 2d at 42. Specifically, Weintraub avers that he received unfounded negative classroom evaluations, performance reviews, and disciplinary reports; was wrongfully accused of sexually abusing a student and abandoning his class; was arrested for misdemeanor attempted assault of another teacher at P.S. 274 on allegedly false grounds; and was ultimately terminated. After the criminal charges against him were dropped, Weintraub was denied reinstatement to teach and unsuccessfully sought review of his dismissal in state court.

V. District Court Proceedings

In July 2000, Weintraub commenced this action in the Eastern District of New York asserting several claims against Defendants, including adverse employment retaliation in violation of the First Amendment. Defendants moved for summary judgment on all of Weintraub's claims.

On April 28, 2006, the district court denied Defendants' motion with respect to Weintraub's First Amendment claim, reasoning that "the content of speech questioning an administrative response, or lack thereof, to discipline problems in the classroom relates to a matter of public concern, regardless of whether that speech comes from a[n] elected official,

citizen, or teacher." *Id.* at 52. Finding that the "form and context of Weintraub's statements" did not warrant a finding to the contrary, and that Weintraub's "primary motivation was a general concern for safety in the classroom and school," rather than "a desire for some personal gain," the district court held that "Weintraub's complaint to Goodman and subsequent grievance were protected by the First Amendment." *Id.*

On May 29, 2007, after Defendants moved for reconsideration in light of the Supreme Court's subsequent decision in *Garcetti*, 547 U.S. at 421-24, the district court granted in part and denied in part Defendants' motion for summary judgment with respect to Weintraub's First Amendment claim. The district court identified three categories of speech for which Weintraub could "plausibly claim retaliation":

> (1) [his] private conversation with Goodman in which he expressed his dissatisfaction with Goodman's handling of the book-throwing incidents and threatened to file a grievance if the situation was not rectified; (2) Weintraub's conversations with other teachers about the incidents and Goodman's failure to impose adequate discipline; and (3) the formal grievance itself.

Weintraub v. *Bd. of Educ. of City of N.Y.*, 489 F. Supp. 2d 209, 214 (E.D.N.Y. 2007) ("*Weintraub II*").

The district court denied summary judgment with respect to the second category, because "Weintraub's conversations with other teachers about his conflict with Goodman . . . [we]re clearly not within the scope of his employment duties." *Id.* at 220.

In contrast, the district court concluded that under *Garcetti* and in light of cases from other circuits applying *Garcetti* in similar situations, the First Amendment does not protect the first and third categories of speech: "In both instances, Weintraub was speaking as an employee, proceeding through official channels to complain about unsatisfactory working conditions." *Id.* at 219-20. The district court, however, believed that "a substantial ground for difference of opinion may exist on" the precise issue of "whether a public employee acts as an 'employee,' and not as a 'citizen,' when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon a matter of public concern, as well as on the employee's own private interests." *Id.* at 221-22. The district court noted that the issue was one of first impression in this circuit. The district court then dismissed Weintraub's First Amendment claims based on his conversation with Goodman and his filing of a grievance. The district court encouraged Weintraub to file an interlocutory appeal on the basis that the case involves a controlling question of law for which there is substantial ground for difference of opinion, and stated its intent to stay the action pending the outcome of any such appeal.

Pursuant to 28 U.S.C. § 1292(b), we accepted Weintraub's interlocutory appeal, which is limited to the question of whether the First Amendment protects his filing of a grievance. We now examine his claim.

DISCUSSION

We review *de novo* the district court's partial grant of summary judgment, construing the evidence in the light most favorable to the non-moving party.

See Tenenbaum v. *Williams*, 193 F.3d 581, 593 (2d Cir. 1999). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c), and accordingly, when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"Regardless of the factual context, we have required a plaintiff alleging retaliation to establish speech protected by the First Amendment." *Williams* v. *Town of Greenburgh*, 535 F.3d 71, 76 (2d Cir. 2008). Under the First Amendment, "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers*, 461 U.S. 138 (1983). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417; *see also Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563 (1968); *Connick*, 461 U.S. at 147. A public employee, however, must "by necessity . . . accept certain limitations on his or her freedom," because, his or her speech can "contravene governmental policies or impair the proper performance of governmental functions." *Garcetti*, 547 U.S. at 418-19. The Supreme Court's employee-speech jurisprudence reflects "the common sense realization[s] that government offices could not function if every employment decision became a constitutional matter," and that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 143, 146. Accordingly,

the Supreme Court has strived "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In *Garcetti*, the Supreme Court, while keeping "these principles in mind," 547 U.S. at 420," 'narrowed the Court's jurisprudence in the area of employee speech' by further restricting the speech activity that is protected." *Reilly* v. *City of Atl. City*, 532 F.3d 216, 228 (3d Cir. 2008) (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 241 (3d Cir. 2007)). *Garcetti* involved a deputy district attorney's memorandum to his supervisor expressing his view that an affidavit used to obtain a search warrant contained serious misrepresentations. 547 U.S. at 414. *Garcetti* explained that "[u]nderlying [the Supreme Court's employee-speech jurisprudence] has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 420 (quoting *Connick*, 461 U.S. at 154). Specifically, *Garcetti* "h[e]ld that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

"If [we] determine[ ] that [Weintraub] either did not speak as a citizen or did not speak on a matter of public concern, '[he] has no First Amendment cause of action based on his . . . employer's reaction to the speech.'" *Sousa* v. *Roque*, 578 F.3d 164, 170 (2d Cir.

2009) (quoting *Garcetti*, 547 U.S. at 418). We hold that Weintraub, by filing a grievance with his union to complain about his supervisor's failure to discipline a child in his classroom, was speaking pursuant to his official duties and thus not as a citizen. Accordingly, Weintraub's speech was not protected by the First Amendment, and there is no cause for us to address whether it related to a "matter of public concern." *See id.*; *see also Garcetti*, 547 U.S. at 421 (finding "the controlling factor" to be whether the employee-speech at issue was made pursuant to official duties and declining to examine whether it related to an issue of public concern).

The *Garcetti* Court defined speech made "pursuant to" a public employee's job duties as "speech that owes its existence to a public employee's professional responsibilities." 547 U.S. at 421. In *Garcetti*, this inquiry was straightforward because the plaintiff admitted that his speech was part of his official job duties. *See id.* at 424. In the instant case, Weintraub asserts that he did not file his grievance pursuant to his official duties. Instead, he contends that "[t]he key" to the First Amendment inquiry provided by *Garcetti* is whether he was "*required*, as part of his employment duties to initiate grievance procedures against . . . Goodman." (Appellant's Br. at 11 (emphasis in original).) Weintraub further alleges that Defendants have pointed to no "rule or regulation of the Board of Education, federal or state statute, job handbook or other job description, [that] state[s] unequivocally that the speech for which [Weintraub] claims he was retaliated against" was made pursuant to his official duties as a public school teacher. (Appellant's Reply Br. at 8.)

We are unpersuaded. The objective inquiry into whether a public employee spoke "pursuant to" his or her official duties is "a practical one." *Garcetti*, 547 U.S. at 424. The *Garcetti* Court cautioned courts against construing a government employee's official duties too narrowly, underscoring that

> [f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25. In light of *Garcetti*, other circuit courts have concluded that speech that government employers have not expressly required may still be "pursuant to official duties," so long as the speech is in furtherance of such duties, *e.g.*, *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007).

In Williams, the Fifth Circuit concluded that the plaintiff, as Athletic Director, spoke pursuant to his official duties when he wrote memoranda to his school principal and office manager requesting information about the use of funds collected at athletic events in order to perform his duties of buying sports equipment, taking students to tournaments, and paying their entry fees. 480 F.3d at 693-94. The *Williams* court explained that "[s]imply because [the plaintiff] wrote memoranda, which were not demanded of him, does not mean he was not acting within the course of performing his job"; instead, "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Id.*

Similarly, in *Renken* v. *Gregory*, 541 F.3d 769 (7th Cir. 2008), the Seventh Circuit held that when a professor complained to university officials about the difficulties he encountered in administering an educational grant he had been awarded, he was speaking as a faculty employee because the grant, though not necessarily a formal requirement of his job, was "for the benefit of students" and therefore "aided in the fulfillment of his teaching responsibilities." *Id.* at 773. *See also Mills* v. *City of Evansville*, 452 F.3d 646, 648 (7th Cir. 2006) (same for a public officer's negative remarks following an official meeting to discuss plans for department reorganization, because the comments were made "in her capacity as a public employee contributing to the formation and execution of official policy"). The Ninth, Tenth, and Eleventh Circuits have drawn similar conclusions, finding that "a public employee's duties are not limited only to those tasks that are specifically designated," *Phillips* v. *City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007). *See, e.g., Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007) (holding that teachers spoke pursuant to their job duties when they discussed the school academy's expectations regarding student behavior, curriculum, pedagogy, and classroom-related expenditures); *Freitag* v. *Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (same for a prison guard's internal complaints documenting her superior's failure to respond to inmates' sexually explicit behavior towards her); *Battle* v. *Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (same for university employee's report alleging improprieties in her supervisor's handling and management of federal financial aid funds).

We join these circuits and conclude that, under the First Amendment, speech can be "pursuant to" a

public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer. In particular, we conclude that Weintraub's grievance was "pursuant to" his official duties because it was "part-and-parcel of his concerns" about his ability to "properly execute his duties," *Williams*, 480 F.3d at 694, as a public school teacher— namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning. *See, e.g.*, *Brammer-Hoelter*, 492 F.3d at 1204 ("[A]s teachers, Plaintiffs were expected to regulate the behavior of their students."). As in *Renken* and *Williams*, Weintraub's speech challenging the school administration's decision to not discipline a student in his class was a "means to fulfill," 541 F.3d at 774, and "undertaken in the course of performing," 480 F.3d at 693, his primary employment responsibility of teaching.

Judge Calabresi's dissent questions whether our decision today conflicts with the result in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). Dissent of J. Calabresi at 207-08. It does not. In *Givhan*, a junior-high English teacher was dismissed primarily because she internally aired her grievances regarding the placement of black people working in the cafeteria, the integration of the administrative staff, and the placement of black Neighborhood Youth Corps workers in semiclerical positions. *See id.* at 411; *Ayers* v. *W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977). Givhan expressed concern with the impression that the "respective roles of whites and blacks" in these positions would leave on black students. *Ayers*, 555 F.2d at 1313. From our brief recitation of the facts of *Givhan*, it is plain that, unlike here, the grievance she

aired was not in furtherance of the execution of one of her core duties as an English teacher. Givhan's grievance concerned the general impression that blacks students might take away from the staffing of non-teaching positions; Weintraub's grievance, in contrast, concerns the administration's refusal to discipline a student who threw books at Weintraub during class.

Our conclusion that Weintraub spoke pursuant to his job duties is supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue. The *Garcetti* Court drew a distinction between the unprotected speech at issue in that case, and "public statements outside the course of performing [an employee's] official duties" which "retain some possibility of First Amendment protection." 547 U.S. at 423. While "[t]he First Amendment protects some expressions related to the speaker's job," *id.* at 421, "[w]hen a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees," *id.* at 424. *Garcetti* provided two examples of speech with a citizen analogue: (1) a schoolteacher's "letter to a local newspaper," which the Supreme Court held to be protected in *Pickering*, because it had "no official significance and bore similarities to letters submitted by numerous citizens every day," and (2) "discussi[ons of] politics with a coworker." *Id.* at 422-23. Although the lack of a citizen analogue is "not dispositive" in this case, *id.* at 420, it does bear on the perspective of the speaker—whether the public employee is speaking as a citizen—which is the central issue after *Garcetti*, *see Williams*, 480 F.3d at 692 (stating that "[u]nder *Garcetti*, we must shift our focus from the content of the

speech to the role the speaker occupied when he said it" to determine whether the speaker was "acting in her role as 'citizen'").

In *Freitag* v. *Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit shed light on when a relevant analogue to citizen speech exists. The *Freitag* court focused on a former prison guard's "responsibility *as a citizen* to expose . . . official malfeasance" in holding that the First Amendment protected her complaints to a state senator and the Inspector General's office about her superior's failure to respond to inmates' sexually explicit behavior towards female guards. *Id.* at 545 (emphasis in original). The *Freitag* court emphasized that there was a relevant citizen analogue to the employee's speech, because the "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee." *Id.*

The lodging of a union grievance is not a form or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative or inspector general. Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication pursuant to an existing dispute-resolution policy established by his employer, the Board of Education. *Cf. Boyce* v. *Andrew*, 510 F.3d 1333, 1343-44 (11th Cir. 2007) (finding that the "form and context" of the employees' complaints, which were made directly to supervisors and were not "sent to an outside entity," weighed against First Amendment protection). As with the speech at issue in *Garcetti*, Weintraub could only speak in the manner that he did by filing a grievance with his teach-

er's union as a public employee. *Cf. Davis* v. *McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (compiling cases "holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job"). His grievance filing, therefore, lacked a relevant analogue to citizen speech and "retain[ed no] possibility" of constitutional protection. *Garcetti*, 547 U.S. at 423.

Notwithstanding the Supreme Court's pronouncement in *Garcetti*, Weintraub urges us to find that his speech is protected by the First Amendment under *Cioffi* v. *Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006), a case we decided two months before the Supreme Court issued its decision in *Garcetti*. In *Cioffi*, we held that the First Amendment protected a high school athletic director's letter to his supervisor and to the school board criticizing the school district's handling of a sexual harassment and hazing incident. *Id.* at 161-65. Weintraub directs us to a footnote in *Cioffi* opining that "[t]he Supreme Court's forthcoming decision in *Garcetti* . . . as to whether the First Amendment protects an employee's *purely job-related speech* . . . does not affect the disposition of [*Cioffi's*] case because the record here establishes that Cioffi's speech was not made *strictly* pursuant to his duties as a public employee." (Appellant's Br. at 15 (quoting *Cioffi*, 444 F.3d at 167 n.3) (emphases in Appellant's Brief)).

We are not persuaded that *Cioffi* compels us to find that the First Amendment protects Weintraub's filing of a grievance. In *Cioffi*, we held that a letter that an athletic director wrote to his supervisor and to the school board was protected speech. *Id.* at 161,

165. The speech at issue in *Cioffi* had been publicly disclosed and the athletic director subsequently pursued the public controversy in a press conference; thus, the "public's interest in receiving the well-informed views" of the athletic director, as a government employee, *Garcetti*, 547 U.S. at 419, was strong. In contrast, Weintraub never communicated with the public about the book-throwing incidents and the school administration's subsequent refusal to discipline the particular student. Accordingly, we remain convinced that under *Garcetti*, because Weintraub made his statements "pursuant to" his official duties as a schoolteacher, he was "not speaking as [a] citizen[ ] for First Amendment purposes," 547 U.S. at 421, and thus, that his speech was not protected.

CONCLUSION

For the reasons stated above, the order of the district court is AFFIRMED.

CALABRESI, Circuit Judge, dissenting:

Garcetti v. *Ceballos*, 547 U.S. 410 (2006), lends itself to multiple interpretations, and the majority's decision to construe it broadly (and, concomitantly, to construe public employees' First Amendment protections narrowly), while a possible reading, is not compelled by anything in the Supreme Court's opinion. Because I think a less expansive definition of speech made "pursuant to . . . official duties," *id.* at 421, is both a more appropriate reading of *Garcetti* and a more constructive resolution of the "delicate balancing" required by the First Amendment in the public employment context, *id.* at 423, I respectfully dissent.

As I read the majority opinion, it holds that a public employee's speech is "pursuant to official du-

ties" and accordingly unprotected when it both (a) is "in furtherance of" the employee's "core duties," and (b) "ha[s] no relevant analogue to citizen speech." Maj. Op. at 198. To be sure, *Garcetti* contains some language that can be read along these lines. But *Garcetti* leaves open the definition of "pursuant to official duties," and I do not think that the majority's two requirements, either separately or in combination, provide the right doctrinal framework for analyzing that question.[7]

The majority's first prong, which looks to whether speech is "in furtherance of" an employee's "core duties," seems to me too broad. The majority's discussion could be read to imply that—assuming the second prong of the majority's test is also satisfied—classroom teachers receive no First Amendment protection anytime they speak on matters that implicate anything that is "an indispensable prerequisite to effective teaching and classroom learning." Maj. Op. at 203. But the prerequisites for effective learning are broad and contentious; everything from a healthy diet to a two-parent family has been suggested to be necessary for effective classroom learning, and hence speech on a wide variety of topics might all too readily be viewed as "in furtherance of" the core duty of encouraging effective teaching and learning. The

---

[7] I do not share the majority's belief that the Supreme Court "'narrowed [its] jurisprudence in the area of employee speech'" in *Garcetti*. Maj. Op. at 201 (quoting *Reilly* v. *City of Atl. City*, 532 F.3d 216, 228 (3d Cir. 2008)). *Garcetti* did not overturn or even call into question any of the Court's prior precedents on employee speech; indeed, it specifically reaffirmed or cited approvingly many of the precedents that the majority opinion suggests were "narrowed." *See, e.g.*, *Garcetti*, 547 U.S. at 417, 419, 420.

line-drawing this entails is necessarily subjective and provides little certainty to the employers and employees who must structure their behavior around our law. Is speech regarding, say, a teacher's concerns about a student's misconduct outside the classroom "in furtherance of" the teacher's core duty of maintaining class discipline? What of a teacher who discovers that a student is the victim of domestic abuse, which is affecting the student's classroom performance, and brings his concerns to the administration's attention? The majority's elaboration of *Garcetti* provides no administrable standards for analyzing such cases, and as such poorly serves not only the courts and juries that will hear future cases but also the parties who look to us for legal guidance.

The majority's second prong, which asks whether there is a "relevant citizen analogue" to Weintraub's speech, Maj. Op. at 203, is also a plausible interpretation of *Garcetti*, but I am not convinced that it is the right one. I do not read *Garcetti's* discussion of "analogue[s] to speech by citizens who are government employees," *Garcetti*, 547 U.S. at 424, to set out a doctrinal requirement. Rather, the Supreme Court was expounding upon "the theoretical underpinnings of [its] decisions." *Id.* at 423. That is, it was explaining *why* speech that is "pursuant to employment responsibilities," *id.* at 424, is unprotected, not defining that category of speech.

The idea that the existence of citizen analogues is a prerequisite for suit seems contradicted by *Garcetti's* statement that the fact that a public employee "expressed his views inside his office, rather than publicly, is not dispositive." *Id.* at 420; *accord Givhan* v. *W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) ("[The Supreme] Court's decisions . . . do not support

the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly."). A "citizen analogue" inquiry will often replicate the private/public distinction that the Supreme Court has disavowed. The majority's analysis illustrates this problem, noting that "[r]ather than voicing his grievance, through channels available to citizens generally, Weintraub made an internal communication pursuant to an existing dispute-resolution policy established by his employer." Maj. Op. at 204.[8] The Supreme Court has made clear that not all internal speech is unprotected, *see Garcetti*, 547 U.S. at 420, and accordingly *some* speech that is not "through channels available to citizens at large" must be free from retaliation.

Even when read together, the majority's two prongs permit readings that would allow retaliation against much speech that seems to me to require protection and to remain protected after *Garcetti*. This sits uneasily with the Supreme Court's repeated assertion that "the members of a community most likely to have informed and definite opinions" about an issue must "be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968); *accord Garcetti*, 547 U.S. at 421. Consider *Givhan*, for example. In *Givhan*, a junior-high teacher had privately requested that the school principal make a number of administrative

---

[8] Additionally, the description of Weintraub's union complaint as an "internal communication" seems dubious. The Union Federation of Teachers is an external body, even if the union representative through whom Weintraub directed his complaint was presumably an employee of the Appellees.

changes, all of which "reflect[ed] Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment." *Ayers* v. *W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977). Writing for a unanimous Supreme Court, then–Justice Rehnquist wrote that Givhan's speech was protected even though it consisted of a private, internal communication and even though the principal was a willing recipient of her speech. *See Givhan*, 439 U.S. at 415-16. Would *Givhan* come out the same way under the majority's framework? Givhan's speech concerned her students' opinions on the school's handling of racial issues, a matter that has serious pedagogical implications. Accordingly, it could be described as a "means to fulfill . . . [his] primary employment responsibility of teaching," and, thereby, as an effort to further her core duty of "effective teaching." Maj. Op. at 203 (internal quotation marks and citations omitted); *cf. id.* at 202 (citing *Renken* v. *Gregory*, 541 F.3d 769, 773 (7th Cir. 2008), for the proposition that any actions taken "for the benefit of students" and that "aid[ ] in the fulfillment of . . . teaching responsibilities" are within a teachers' duties). And it certainly was a private communication to a willing audience that a regular citizen likely could not access in the same way. As a result, I fear that some courts will conclude that speech like Givhan's would fail both prongs of the majority's test. But *Garcetti* specifically reaffirmed *Givhan*. *See Garcetti*, 547 U.S. at 420-21.[9]

---

[9] I recognize and greatly appreciate the majority's analysis of why its two-prong test is consistent with *Givhan*, and why *Givhan* is distinguishable from the case before us. But if *Givhan* survives it is because the two-pronged test the majority employs is not in fact the end of the matter. For that reason, I dis-

Furthermore, the pragmatic concerns motivating *Garcetti* do not support such an expansive reading. *Garcetti* recognized the need for employers to have the freedom to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Id.* at 422-23. When an employee is engaged in speech that the "employer itself has commissioned or created," *id.* at 422, then the employee is acting as an agent or a mouthpiece of the employer, and the employer must have a substantial degree of control over the employee's execution of his responsibilities. If an employer could not discipline or fire an employee for the substance of his work product, the employer would be all but unable to function.

By contrast, when an employee's speech is not part of the implementation of the employer's business operations, the employer does not depend on "substantive consistency and clarity," *id.* at 422, in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection, for an exemption that sweeps more broadly than necessary will likely encourage employees to make complaints publicly when they might otherwise be handled internally. *See id.* at 424 ("Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.").[10]

---

cuss *Givhan* primarily to illustrate why I believe that the test outlined today does not suffice to differentiate protected and unprotected speech.

[10] On this point, both the majority and at least one of the dissenters in *Garcetti* were in agreement. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a

I would hold the scope of *Garcetti* to be coextensive with its prime concerns and to go no further. An employee's speech is "pursuant to official duties" when the employee is required to make such speech in the course of fulfilling his job duties. This necessitates a "practical" inquiry into each plaintiff's job duties. *See id.* at 424; *see also Marable* v. *Nitchman*, 511 F.3d 924, 932-33 (9th Cir. 2007). I do not mean to suggest that speech must be explicitly envisioned in a job description or specifically requested by the employer; on this point I agree with the majority. *See* Maj. Op. at 203. ("[S]peech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer."). But it must be possible to say that the employer has "commissioned or created" the speech, *Garcetti*, 547 U.S. at 422—that the employer in some way *relies* on the speech made by the employee, as where the speech is an "official communications" or is used by the employer to "promote the employer's mission," *id.* at 423.

In *Garcetti*, for example, the plaintiff Richard Ceballos's responsibilities as a calendar deputy called for him "to advise his supervisor about how best to proceed with . . . pending case[s]." *Id.* at 421. The speech at issue involved a memo recommending that a case assigned to Ceballos be dismissed, which Ceballos was not authorized to do without his supervisor's approval. Brief of Petitioner at 4, *Garcetti*, 547 U.S. 410 (2006). The memo that Ceballos wrote was not merely related to his job duties, but rather it was

---

new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

the very thing he was paid by the Los Angeles County District Attorney's Office to do. Without Ceballos's competent advice and input, his employer could not function anywhere near as well. His employer therefore had a need to supervise the quality and content of that speech, and was entitled to discipline him accordingly.

As far as the record reflects, Appellees here did not in any way depend on Weintraub bringing union grievances or refraining from bringing them (subject, of course, to the requirement that speech not "disrupt[ ] the workplace," *Cioffi* v. *Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 162 (2d Cir. 2006)). He may well have been in a position to file a grievance only because of his official duties, and the subject matter of that grievance may have had the potential to further those duties, but neither of these facts establishes that he filed his grievance *pursuant* to his official duties.

In the present posture of the case, I take it as a given that Weintraub's duties entailed informing the school administration of violent incidents, such as those at the root of this case, as a means of facilitating the school's disciplinary apparatus. This justifies the District Court's holding that Weintraub's comments to his supervisor were not protected.[11] But grieving the administration's response through his union is quite another matter. And neither the Appellees nor the majority direct us to any evidence that such a response was in any way required of Weintraub. It is possible that the union grievance was an official part of a process by which employees

---

[11] Because Weintraub does not appeal this part of the District Court's holding, we need not consider it in any detail.

brought subjects of concern to Appellees' attention, facilitating corrective action; if this were the case, then Weintraub's grievance might be pursuant to his official duties and exempt from First Amendment protection.[12] But on the record before us, there is no reason to think this is so.[13]

For these reasons, I respectfully dissent.

---

[12] As a general matter, I doubt that most employers would view union activity as something that their employees do *for the employer's benefit*. There is a distinct irony in the idea that unions, which so many employers seek to exclude from the workplace, are somehow transmuted into entities that "promote the employer's mission," *Garcetti*, 547 U.S. at 423, for purposes of the First Amendment.

[13] If nothing else, this presents a question that should be explored on remand or put before a jury. It should not be disposed of on summary judgment without further inquiry. This is exactly what the Ninth Circuit did in *Freitag* v. *Ayers*, 468 F.3d 528 (9th Cir. 2006), upon which the majority relies. *Freitag* found that a first level of internal forms filed by a corrections officer about inmate misconduct was unprotected, as the officer was "required as a part of her official duties to report inmate misconduct and to pursue appropriate discipline," but it also remanded the case to the district court "for a determination of whether prison guards are expected to air their complaints regarding prison conditions all the way up to the CDCR director." *Marable*, 511 F.3d at 932; *see also Freitag*, 468 F.3d at 546. I agree with the majority that *Freitag* provides a good model for the case before us—but I do not believe that it supports the majority's conclusion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

David WEINTRAUB,

Plaintiff,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, Community School District No. 32, Lawrence Becker, Jerry Cioffi, Dawn Felder, Jamin Felder, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano,

Defendants.

No. 00-CV-4384 (ILG).

May 29, 2007.

MEMORANDUM AND ORDER

GLASSER, Senior District Judge.

In this civil action alleging, *inter alia*, unconstitutional retaliation against the plaintiff, a former employee of the Board of Education of the City of New York, the City[1] has filed a motion seeking re-

[1] All of the individual defendants in this action are individuals employed by the public school system as teachers and administrators. All of the defendants are being represented by the New York City Office of Corporation Counsel. The Court shall therefore refer to the defendants collectively as the "City."

consideration of this Court's prior order denying summary judgment in favor of the defendants on the plaintiff's claim that the City violated his constitutional rights under color of state law, in violation of 42 U.S.C. § 1983 ("§ 1983"). For the reasons stated below, the City's motion is granted in part and denied in part.

BACKGROUND

On April 28, 2006, this Court issued a Memorandum and Order granting in part and denying in part the City's motion for summary judgment. *See Weintraub* v. *Bd. of Ed. of the City of New York*, 423 F. Supp. 2d 38 (E.D.N.Y. 2006) ("*Weintraub I*").[2] In summary of the portion of that opinion relevant to this motion, Mr. Weintraub alleges that the conflicts giving rise to this action began on November 6, 1998, when he was employed as a teacher at Public School 274 in Brooklyn, New York. On that date, Mr. Weintraub sent a student in his class to the office of Douglas Goodman, the assistant principal at PS 274, after the student threw a book at Mr. Weintraub. Mr. Goodman allegedly returned the student to Weintraub's classroom shortly thereafter. On November 9, 1998, the same student again threw a book at Weintraub, and Weintraub once again sent the student to Goodman for discipline. Goodman again instructed the student to return to Weintraub's classroom shortly thereafter. Dissatisfied with Goodman's response, Mr. Weintraub approached Mr. Goodman privately and told him that "[i]f nothing is going to be done about this, I will have to file a grievance because it is not an environment a teacher would want to go to

---

[2] Familiarity with the facts of this case and the issues of law discussed in *Weintraub I* is herein presumed.

where a child is allowed to throw a book at teachers." *Weintraub I*, 423 F. Supp. 2d at 42. Mr. Weintraub also discussed the situation with other teachers at PS 247, and ultimately filed a grievance through his union representative. He alleges that these actions prompted an escalating series of retaliatory steps by Mr. Goodman and other school officials, which began with unfounded negative performance reviews and disciplinary reports that were placed in, and ultimately removed from,[3] Mr. Weintraub's employee file, and culminated with false accusations of sexual abuse of a student, an arrest for misdemeanor attempted assault on allegedly false grounds, and Mr. Weintraub's ultimate termination.[4]

On July 28, 2000, Mr. Weintraub commenced this action, claiming, *inter alia*, that the retaliatory steps taken against him in retribution for his complaints about Mr. Goodman's handling of the disciplinary matter in November 1998 constitute an illegal infringement upon his First and Fourteenth Amendment rights, in violation of § 1983. In the portion of the prior order relevant to the present motion, the Court held that the plaintiff has stated a claim under § 1983, and that genuine issues of material fact precluded the entry of summary judgment for the City. Central to the Court's holding was its con-

---

[3] In one instance, Weintraub's superiors failed to comply with a grievance arbitrator's order to delete substantial portions of an unfavorable observation report from Weintraub's file, instead drawing thin lines through the portions of the report that the arbitrator found to be unfounded. *See Weintraub I*, 423 F. Supp. 2d at 43-44.

[4] *See Weintraub I*, 423 F. Supp. 2d at 42-48 for a detailed discussion of Mr. Weintraub's conflict with Mr. Goodman and the allegedly retaliatory steps taken against him.

clusion that Weintraub's speech was protected by the First Amendment under the standards set forth by the Supreme Court in *Pickering* v. *Bd. of Ed. of Township High Sch. Dist. 205*, Will Cty., 391 U.S. 563 (1968). In support of its conclusion that Weintraub's allegations satisfy the *Pickering* test, the Court determined that Weintraub's concerns about the lack of discipline and safety in New York City public schools, while clearly relevant to his personal interests, also pertained to a matter of public concern. On May 14, 2007, the City filed a motion requesting that the Court reconsider its earlier holding in light of the subsequent decision by the United States Supreme Court in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006).

DISCUSSION

1. The Garcetti Decision

In support of its renewed motion to dismiss Weintraub's § 1983 claim, the City argues that the Supreme Court's decision in *Garcetti*, issued approximately one month after *Weintraub I*, undermines this Court's determination that Weintraub has stated a valid claim of First Amendment retaliation under § 1983. In *Garcetti*, the respondent, Richard Ceballos, employed at the time as a calendar deputy[5] in the Los Angeles County District Attorney's Office, was contacted by a defense attorney who informed Ceballos that the affidavit used by law enforcement to obtain a search warrant that led to the arrest of the defense attorney's client contained "serious mi-

[5] The *Garcetti* opinion does not elaborate on the role of a calendar deputy, except to note that the position involves "certain supervisory responsibilities over other lawyers." 126 S.Ct. at 1955.

srepresentations." *Id.* After conducting an independent investigation, Ceballos concluded that the search warrant had been improperly obtained, and submitted a "disposition memorandum" to his supervisors recommending that the prosecution be discontinued for that reason. *Id.* at 1955-56. His supervisors nevertheless decided to pursue the prosecution, at which point the defense attorney made a motion to traverse the search warrant and called Ceballos to testify at the hearing on that motion about his conclusions regarding the underlying affidavit. *Id.* at 1956. Ceballos alleged that, after this incident, he suffered several retaliatory employment actions, "includ[ing] reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Id.* In response to these adverse actions, Ceballos filed an employee grievance, which was denied, and then commenced an action in the United States District Court for the Central District of California, alleging that his supervisors violated his First and Fourteenth amendment rights in retaliation for the statements made in his disposition memo. *Id.* The district court dismissed Ceballos's action, finding that his memo was not protected speech because it was written pursuant to Ceballos's employment duties. *Id.* The Ninth Circuit reversed, holding that the memorandum satisfied the criteria set forth in *Pickering*, because the subject matter of Ceballos's memo "was 'inherently a matter of public concern," and because the defendants " 'failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office' as a result of the memo." *Garcetti*, 126 S.Ct. at 1956-57 (quoting *Ceballos* v. *Garcetti*, 361 F.3d 1168, 1173, 1180 (9th Cir. 2004)).

The Supreme Court reversed the Ninth Circuit's opinion, holding that because Ceballos "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case," but rather "acted as a government employee," the disposition memo was not protected by the First Amendment, and therefore could not form the basis of a First Amendment retaliation claim. *Garcetti*, 126 S. Ct. at 1960. Recognizing "the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance'"as underlying its previous opinions on the issue of First Amendment protection for state employee speech, the Court concluded that, although Ceballos's speech was relevant to a matter of public concern, it nevertheless failed to satisfy the first prong of the *Pickering* test, which, the Court explained, requires that the state employee be acting as a private citizen rather than as a public employee in order for First Amendment protection to attach. *Id.* at 1959 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)). In reaching its conclusion "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," the Court read a third element into the traditional *Pickering* analysis, characterizing the *Pickering* test as "first requir[ing] determining whether the employee spoke *as a citizen* on a matter of public concern," and, if so, "whether the relevant government entity had an adequate justification for treating the employee different from any other member of the general public." *Garcetti*, 126 S.Ct. at 1958 (citing *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at

147) (emphasis added). The cited passage in Pickering recognizes the "interests of the teacher, as a citizen, in commenting upon matters of public concern" as a justification for upholding a degree of First Amendment protection for workplace speech; prior to Garcetti, this language formed the basis of the principle applied by this Court in *Weintraub I* that "[w]hen an employee's comments are motivated not by some 'altruistic' desire to improve the public service or protect the public, but rather strictly by personal emotions or interest, the First Amendment does not protect the employee from corresponding administrative action." 423 F. Supp. 2d at 51.[6] However, *Garcetti* works an innovation upon the law by transmuting this principle, formerly a simple corollary to the proposition that a state employee's speech must concern a matter of public interest in order to enjoy First Amendment protection, into a new and independent element of a claim of First Amendment retaliation-that the public employee's speech was

---

[6] Likewise, the Court's holding in *Connick* that "that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior" was not generally interpreted prior to *Garcetti* as suggesting that speaking "as a citizen" meant anything more than speaking upon a matter of public, as opposed to purely private, concern. 461 U.S. at 147. *See Public Employee Speech*, 120 Harv. L. Rev. 273, 278 (2006) ("[I]n both *Pickering* and *Connick*, the phrase 'as a citizen' operated not independently but rather as a marker present when employees spoke on issues of public concern. Yet *Garcetti* isolated the words 'as a citizen' and made them determinative: henceforth, public employees speaking 'pursuant to official duties' will not be speaking 'as citizens for First Amendment purposes.'").

made in the employee's capacity as a private citizen rather than as an employee, a criterion that is never satisfied when the employee speech at issue was made pursuant to the employee's official duties. That is to say, "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 126 S. Ct. at 1961.

2. Garcetti Requires Reconsideration of Weintraub I

The *Garcetti* decision "profoundly alters how courts review First Amendment retaliation claims," and compels the Court to reconsider its earlier ruling that the speech underlying Weintraub's First Amendment retaliation claim is constitutionally protected. *Casey* v. *West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007). In Weintraub I, the Court recognized three categories of protected speech for which Weintraub could plausibly claim retaliation: (1) Weintraub's private conversation with Goodman in which he expressed his dissatisfaction with Goodman's handling of the book-throwing incidents and threatened to file a grievance if the situation was not rectified; (2) Weintraub's conversations with other teachers about the incidents and Goodman's failure to impose adequate discipline; and (3) the formal grievance itself. *See Weintraub I*, 423 F. Supp. 2d at 42. Under the Supreme Court's First Amendment doctrine as revised by Garcetti, the Court is compelled to conclude that the first and third of these categories are no longer viable bases for a First Amendment retaliation claim.

The City argues that Weintraub's claim is barred by *Garcetti* because all of the statements underlying that claim were made in his capacity as an employee,

rather than as a citizen. In support of this view, the City observes that "[o]bviously, it is within the job duties of any teacher to maintain discipline within his classroom, and Weintraub's referral of the student to Goodman . . . falls within these duties." Def. Br. at 4. The City also cites a portion of the "Agreement between the Board of Education of the City School District of the City of New York and United Federation of Teachers," which sets out the grievance and appeal procedure for disputes between teachers and school ad-ministration regarding student disciplinary matters. *Id.* Ex. C. In response, Weintraub points out that the City's argument incorrectly identifies the statements for which Weintraub alleges he suffered unconstitutional retaliation—Weintraub does not argue that his act of referring the student to Goodman is what prompted the escalating series of allegedly retaliatory actions; rather, he argues that his subsequent acts of complaining to Goodman about Goodman's handling of the situation, speaking to other teachers, and filing an official grievance prompted the unlawful retaliation. Weintraub's argument that the city misrepresents the actual basis of his First Amendment retaliation claim is correct, but does not alter the outcome of the City's motion in Weintraub's favor.

As noted above, *Garcetti* held that a public employee's speech is not protected by the First Amendment when speaking as an employee rather than as a citizen, and found the dispositive distinction between the two roles to be whether the speech was made pursuant to the employee's official duties or

was not required by those duties.[7] This interpretation is consistent with that of other federal courts applying *Garcetti* in similar circumstances, which have interpreted its language to mean that, if a public employee is compelled by his official duties to make the statement in question, the *Garcetti* rule excludes that statement from First Amendment protection, and the employer may retaliate against the employee on the basis of that speech without violating the employee's First Amendment rights. The Tenth Circuit's decision in *Casey* offers a concise illustration of the distinction between speech as an employee and speech as a citizen. In that case, the plaintiff was appointed Superintendent of the West Las Vegas Independent School District (the "District") in New Mexico by the West Las Vegas School Board (the "Board") in January 2002. In this capacity, she also served as the Chief Executive Officer ("CEO") of the District's Head Start program, "a federally funded initiative aimed at providing educational opportunities, meals, and health care services to low-income children between three and five years of age." *Casey*, 473 F.3d at 1325. Approximately one year later, Ms. Casey became aware that "as many as 50% of the families enrolled in the District's Head

---

[7] As the *Garcetti* court noted, neither the fact that a state employee's speech pertains to matters relevant to his official duties, nor the fact that it was made in private to his supervisor rather than in a public forum, is dispositive of the First Amendment inquiry. *See Garcetti*, 126 S. Ct. at 1959 ("That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. . .. The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive."). Rather, the "controlling factor" in *Garcetti* was whether Ceballos's statements "were made pursuant to his duties as a calendar deputy." 126 S. Ct. at 1959-60.

Start program appeared to have incomes that were too high for them to qualify for participation" in that program. *Id.* at 1326. She informed the president and other members of the Board about the possible fraud on several occasions between January and April 2003, but "was variously told not to worry about it, to leave it alone, or not to go there." *Id.* Unsatisfied with these responses, Ms. Casey instructed her assistant to notify the regional Head Start office in Dallas of her suspicions. This notification led to an investigation by the United States Department of Health and Human Services, which concluded that "certain enrollments in the District's Head Start program were indeed improper and ordered the repayment of more than half a million dollars in federal aid." *Id.* During approximately the same time period, Ms. Casey became concerned that the Board "was violating the New Mexico Open Meetings Act by making personnel and other decisions in executive session without proper notice and meeting agendas." *Id.* Ms. Casey informed the Board of her concerns, and when it took no action in response, she filed a written complaint with the New Mexico Attorney General, who commenced an investigation that ultimately concluded that the Board's practices were in violation of the Open Meetings Act, and ordered corrective action. Finally, also during approximately the same time period, Ms. Casey "brought to the Board's attention a number of other issues . . . that, she believed, violated federal or state laws," including deficiencies in the Board's hiring process and its handling of a situation in which a principal and teacher were having an affair. *Id.* On May 8, 2003, the Board voted not to renew Ms. Casey's contract as Superintendent, and to demote her to the position of Assistant Superintendent. Ms. Casey then filed an action against the

District and certain individual defendants, "alleging, *inter alia*, that she was dismissed in retaliation for exercising her First Amendment rights." *Id.* The District moved for summary judgment on the First Amendment retaliation claim based on qualified immunity, which the district court denied. While the District's interlocutory appeal of the qualified immunity issue was pending, the Supreme Court issued its *Garcetti* opinion, and the Tenth Circuit requested additional briefing from the parties to address the impact of *Garcetti* on Ms. Casey's First Amendment retaliation claim.

The appellate court identified "three specific sets of communications that Ms. Casey cites as the bases for her First Amendment retaliation claims, those regarding (i) the Head Start Program, (ii) the New Mexico Open Meetings Act, and (iii) miscellaneous other violations of state or federal law. . .." *Id.* at 1329. Ms. Casey conceded, and the appellate court agreed, that the third category of communications, comprised of Ms. Casey's statements to the Board regarding miscellaneous violations of federal and state law in its routine operations, was clearly unprotected speech under the *Garcetti* rule because "these statements fell within the scope of her duties as Superintendent because they were aimed solely to the School Board to which she reported and her job admittedly included advis[ing] Defendants about the lawful and proper way to conduct school business." *Id.* (quotation marks and citation omitted, alteration in original). With respect to the first category of communications—Ms. Casey's statements regarding fraud in the Head Start program-the court divided those communications into two sub-categories: statements directed to Board members, and Ms. Casey's direction to her assistant to notify the regional Head Start of-

fice of the possible fraud. As to the first class of Head Start statements, the court held that these were unprotected speech under *Garcetti* because "these comments were directed only to her supervisors and . . . Ms. Casey sought to raise concerns about the legality of the District's operations." Because Ms. Casey admitted that advising the Board with respect to the legality of its conduct was a part of her responsibilities as Superintendent, the court "conclude[d] that Ms. Casey made these statements pursuant to her official duties." *Id.* The second subcategory of Head Start communications—Ms. Casey's instruction to her assistant to notify the regional office of the irregularities despite the School Board's instructions to remain silent about the matter—required a lengthier analysis. The court noted that Ms. Casey's duties as CEO of the District's Head Start program "included acting pursuant to, or in compliance with, certain federal regulations" that required, inter alia, that Head Start participants meet "specific income eligibility requirements," and that federal law imposed civil and criminal liability on a person in Ms. Casey's position who was aware of financial misstatements in the District's Head Start reports but failed to inform the appropriate federal authorities. *Id.* at 1330 (citing 45 C.F.R. § 1305.10 (2002)). The court further noted that Ms. Casey regarded the matter as sufficiently related to her employment duties that she deemed it appropriate to delegate the responsibility to her assistant, and that her assistant evidently did not object that Ms. Casey was acting outside the scope of her official authority. In light of these facts, the court concluded that Ms. Casey's conduct with respect to the Head Start reporting suggested "an individual striving diligently to fulfill a federal regulatory obligation directly bearing on

her by virtue of the office she held." *Id.* at 1331. Though recognizing that Ms. Casey's actions concerned a matter of "great public import," the court nevertheless concluded that her communications with the regional office were not constitutionally protected because her speech in that situation was "more akin to a that of a senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time." *Id.* Finally, addressing the second category—Ms. Casey's statements regarding the Open Meetings Act—the court again divided her statements into two categories: her direct statements to Board members about her concerns, and the complaint she filed with the New Mexico Attorney General. With respect to the first subcategory, the court followed the same analysis that it had with the other categories, concluding that Ms. Casey's speech was not constitutionally protected because her statements "were made solely to her superiors and Ms. Casey, as Superintendent, had a duty to provide candied advice and counsel to the Board, much as any corporate CEO might to his or her board of directors." *Id.* at 1332. The court concluded, however, that the second sub-category, Ms. Casey's complaint to the Attorney General, was "another kettle of fish," and was entitled to First Amendment protection. *Id.* The court found that, in filing her complaint with the state, Ms. Casey was not acting pursuant to her duty to advise the Board of its legal obligations, but "[j]ust the opposite: she had lost faith that the Board would listen to her advice so she took her grievance elsewhere." *Id.* It distinguished Ms. Casey's action in notifying an external agency, the Office of the Attorney General, about the School Board's violations of state law from her actions regarding the Head Start program, in which she also

notified an external governmental agency of illegal activity in the District, on the ground that, "very much unlike the . . . Head Start program that the Board committed to her care and pursuant to which she had independent responsibilities to the federal government, we have no evidence in the summary judgment record . . . that the Board . . . ever assigned Ms. Casey responsibility for the Board's meeting practices." *Id.* After concluding that Ms. Casey's statements to the Attorney General satisfied the other elements of the *Pickering* test, the court held that "even after *Garcetti*, a claim based on these statements remains legally viable," because they involved illegalities that Ms. Casey "had no apparent duty to cure or report and which were not subject to her control." *Id.* at 1334. The Tenth Circuit thus remanded the case to the district court with instructions to proceed on the First Amendment retaliation claim based only on Ms. Casey's statements to the Attorney General.

Another appellate decision addressing the application of *Garcetti* to circumstances similar to those presented here is *Freitag* v. *Ayers*, 468 F.3d 528 (9th Cir. 2006), in which the Ninth Circuit partially upheld a jury verdict on a First Amendment retaliation claim brought by a former California prison guard against her former supervisors, in which the plaintiff alleged that her supervisors had taken a number of adverse actions against her, including commencing several Internal Affairs investigations, temporarily relieving her of duty, and ultimately terminating her employment, in retaliation for the plaintiff's actions in reporting sexually hostile and harassing actions routinely performed by inmates in the Pelican Bay State Prison's Secure Housing Unit against the plaintiff and other female guards. Specif-

ically, the *Freitag* court identified six categories of speech that the district court had instructed the jury were protected by the First Amendment:

(a) Reporting sexually hostile inmate conduct to agents of the California Department of Corrections, either formally or informally;

(b) Documenting Pelican Bay State Prison's responses or failures to respond to Plaintiff's reports of sexually hostile inmate conduct;

(c) Informing Cal Terhune, Director of the California Department of Corrections, of either the inmates' sexually hostile conduct or of Pelican Bay State Prison's responses or failures to respond;

(d) Informing State Senator Richard Polanco either of sexually hostile conduct or of the Pelican Bay State Prison's responses or failures to respond;

(e) Reporting either sexually hostile conduct or Pelican Bay State Prison's responses or failures to respond to the Office of the Inspector General; or

(f) Cooperation with the investigation conducted by the Office of the Inspector General.

468 F.3d at 544. The court held that categories (a) and (b) were "clear [ly] . . . *not* constitutionally protected," because the plaintiff was under a duty pursuant to her employment as a prison guard to document inmates' sexually hostile behavior and the prison's response, but further held that items (d) through (f)—*i.e.*, the plaintiff's contact with Senator Polanco and the Office of the Inspector General about the inmate situation and the prison's failure to adequately respond—were protected under the First Amendment because the plaintiff was acting in her capacity as a citizen rather than as a state employee

in those communications.[8] *Id.* (emphasis in original). The court supported its conclusion that the plaintiff was speaking as a citizen in examples (d) through (f) with the observation that "[i]t was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace," and remanded the case to the district court to determine, inter alia, whether the court's instruction to the jury that categories (a) and (b) were protected speech was harmless error. *Id.* at 545.

The general principle running through these and other cases applying *Garcetti* to similar situations is that, when a public employee airs a complaint or grievance, or expresses concern about misconduct, to his or her immediate supervisor or pursuant to a clear duty to report imposed by law or employer policy, he or she is speaking as an employee and not as a citizen; in such cases, the First Amendment does not protect the employee's speech from discipline or retaliation by the employer.[9] In such circumstances,

---

[8] The *Freitag* court held that an unresolved issue of fact existed with respect to category (c), because the court was "unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR at the state capitol in Sacramento." *Id.* at 546.

[9] *See, e.g.*, *Mills* v. *City of Evansville*, 452 F.3d 646, 647-48 (7th Cir. 2006) (Easterbrook, J.) (Police sergeant who approached Police Chief, Deputy Chief, and Assistant Chief on departmental premises to ex-press criticisms of Police Chief's new plan of personnel allocation "spoke in her capacity as a public employee contributing to the formation and execution of official policy," and her speech was therefore not protected); *Spiegla* v. *Hull*, 481 F.3d 961 (7th Cir. 2007) (prison gate guard was "was speaking pursuant to her official duties—not as a citizen" when she

the employer is free to "discipline" the employee without violating the employee's First Amendment rights.[10] *Garcetti*, 126 S. Ct. at 1958. If, however, the employee goes outside of the established institutional channels in order to express a complaint or concern, the employee is speaking as a citizen, and the speech is protected by the First Amendment. Applying this

---

raised concerns with her supervisor about apparent breach in security protocol).

[10] *Garcetti* draws no distinction between good-faith employer *discipline* based on an employee's incompetent or insubordinate conduct, which the government in its capacity as employer would presumably have been free to punish even under the unaltered *Pickering* test, and bad-faith *retaliation* based on an employee's "blowing the whistle" on internal misconduct or other facts that cause public embarrassment to the employer. The *Garcetti* rule clearly encompasses the latter category of employee speech when made pursuant to an employee's job duties, though such speech would have been protected under the old *Pickering* rule.

Like other courts that have applied *Garcetti* in similar circumstances, this Court is "is gravely troubled by the effect of *Garcetti* " upon situations such as this one, in which a public employee is deprived of a federal constitutional remedy for his employer's alleged bad-faith retaliation for statements that were neither incompetent nor insubordinate, but rather identified legitimate issues regarding the safe and effective operation of the public school system. *Williams* v. *Riley*, 481 F. Supp. 2d 582 (N.D. Miss. 2007); *see also Spiegla*, 481 F.3d at 967 (vacating jury verdict in plaintiff's favor pursuant to *Garcetti*, "but not without our observation that the record and the jury's verdict substantiate that *Spiegla* was punished for simply trying to follow the rules."). Though it questions the wisdom of a constitutional policy that disincentivizes public employees from bringing serious misconduct and abuse to the attention of their superiors, while perversely encouraging them to take every internal conflict to the highest levels of governmental oversight, this Court must nevertheless apply the *Garcetti* rule in good faith until the Supreme Court sees fit to revisit the issue.

principle to the situation presented in this case, it is clear that Weintraub's actions in speaking privately with Goodman to express his concerns about classroom safety and filing the formal grievance are not protected speech under the *Garcetti* Court's interpretation of the First Amendment. In both instances, Weintraub was speaking as an employee, proceeding through official channels to complain about unsatisfactory working conditions. Under *Garcetti*, the fact that Weintraub's speech also touched upon a matter of public concern is not sufficient to entitle that speech to First Amendment protection. Weintraub's conversations with other teachers about his conflict with Goodman, however, are clearly not within the scope of his employment duties. He had no official duty to discuss the matter with his colleagues, nor did he do so as part of a formal dispute-resolution process put into place by his employer. Thus, when speaking to his co-workers about his concerns regarding school safety and Goodman's handling of the book-throwing incidents, Weintraub was speaking as a citizen rather than as an employee. While the extent to which any of the allegedly retaliatory actions taken by the City are directly traceable to Weintraub's conversations with other teachers, as opposed to his confrontation with Goodman and his formal grievance, is unclear, Weintraub is not barred by *Garcetti* from presenting his § 1983 claim, based solely on retaliation with respect to his private conversations with his colleagues, to the jury.

Weintraub argues that his First Amendment retaliation claim survives *Garcetti* in its entirety, but cites only one case, *Sassi* v. *Lou-Gould*, No. 05-CV-10450, 2007 WL 635579 (S.D.N.Y. Feb. 27, 2007), for that proposition. *Sassi* is easily distinguishable from the situation presented here. In *Sassi*, the plaintiff, a

police officer in Beacon, New York, filed an action against the City of Beacon, alleging, inter alia, that the City had taken certain adverse employment actions against him in retaliation for critical statements regarding police department funding and morale made by the plaintiff's father, the Beacon Chief of Police, in several letters to the City Council.[11] The court, noting that Chief Sassi's letters to the City Council specifically stated that he was writing in his capacity as a " 'resident taxpayer' of the City of Beacon," rejected the City's argument that the letters were written pursuant to Chief Sassi's official duties, and were therefore unprotected speech under *Garcetti*. *Id.* at *2. The court reasoned that "[u]nlike the plaintiff is [sic] *Garcetti*, whose job it was to write the communications which he claimed constituted protected speech, Chief Sassi had no such duty to write public letters to the City Council 'as a resident taxpayer,'" and concluded that Chief Sassi was therefore speaking as a citizen, rather than as a public employee, in his letters. *Id.* at *3. Concluding that the plaintiff had satisfied all of the other elements of First Amendment retaliation, the court granted summary judgment in his favor on his § 1983 claim.

Weintraub's situation is clearly distinguishable from *Sassi*. Unlike Chief Sassi, who voluntarily wrote in his capacity as a private citizen about general problems in the police department to an external governmental organization, Weintraub's conversation with Goodman and his formal grievance were purely internal communications pursuant to an es-

---

[11] The *Sassi* court held that the plaintiff had standing to sue for retaliation on the basis of statements made by his father. *See id.* 2007 WL 635579, at *2 n.4.

tablished dispute-resolution policy for the governmental agency by which he was employed. Chief Sassi's letter is analogous to Officer Frietag's communications with Senator Polanco and the Office of the Inspector General that the Ninth Circuit held to be protected speech in *Freitag*, whereas Weintraub's speech is analogous to the disposition memorandum that ADA Ceballos submitted to his direct superiors, pursuant to his official duties as a calendar deputy. *Sassi* therefore does not provide a basis upon which to distinguish Weintraub's situation from the weight of authority holding that public employees who convey complaints or grievances about a matter pertaining to their official duties to their supervisors do so in their capacities as employees rather than citizens, even when the subject matter of their speech touches upon a matter of public concern, and that such speech is not protected by the First Amendment.

It is therefore clear that the Supreme Court's decision in *Garcetti* precludes Weintraub's § 1983 claim, to the extent that that claim is based on Weintraub's private conversation with Goodman and his formal grievance.[12] To the extent, however, that

---

[12] Mr. Weintraub also argues that *Garcetti* is not dispositive of his § 1983 claim because the *Garcetti* majority rejected Justice Souter's argument in dissent that its opinion "may have important ramifications for academic freedom, at least as a constitutional value," 126 S. Ct. at 1962 (citing 126 S. Ct. at 1969-70 (Souter, J., dissenting)) on the ground that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 1962. This argument is frivolous; it is clear from the context of the Court's statement that its reference to "teaching" refers to the substance of academic expression, not to the enforcement of disciplinary procedures in a public classroom. The conflicts between

Weintraub claims the City retaliated against him for his conversations with other teachers regarding the facts underlying his grievance, he may present that claim to the jury.

3. Plaintiff Shall be Permitted to Pursue an Interlocutory Appeal

28 U.S.C. § 1292(b) provides that, "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." The Court believes that those criteria are satisfied here. The question of how a district court is to distinguish which acts of a public employee are performed pursuant to an employment duty has been addressed by the Second Circuit only in one brief, unpublished opinion. *See DeFilippo* v. *New York State Unified Court Sys.*, No. 06-1561-CV, 2007 WL 1174135 (2d Cir. April 19, 2007).[13] In *DeFilippo*, the Second Circuit summarily affirmed an

---

Weintraub and the defendants at issue here have nothing to do with the infringement of Weintraub's "academic freedom," as that term is understood in First Amendment jurisprudence.

[13] Aside from *DeFilippo*, the Second Circuit has cited *Garcetti* in only six other cases. *See Reuland* v. *Hynes*, 460 F.3d 409 (2d Cir. 2006); *Zelnik* v. *Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006); *Skehan* v. *Vill.* of Mamaroneck, 465 F.3d 96 (2d Cir. 2006); *Paola* v. *Spada*, 204 Fed.Appx. 946 (2d Cir. 2006); *McGuire* v. *Warren*, 207 Fed.Appx. 34 (2d Cir. 2006); *Morris-Hayes* v. *Bd. of Educ. of Chester Union Free City Sch.*, 211 Fed. Appx. 28 (2d Cir. 2007). None of those opinions involve any substantial analysis of the effects of *Garcetti* on the application of the First Amendment to public employee speech.

order of Judge Garaufis of this District granting summary judgment in favor of the defendant where the plaintiff conceded in a deposition that the Unusual Occurrence Report underlying the plaintiff's First Amendment retaliation claim was prepared pursuant to his duties as a court officer. The Second Circuit has not yet addressed the precise issue presented here: whether a public employee acts as an "employee," and not as a "citizen," when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon a matter of public concern, as well as on the employee's own private interests. While the Court believes that the weight of authority among the federal courts that have applied *Garcetti* in similar circumstances supports the view that Weintraub's conversation with Goodman and his formal grievance are unprotected speech, a substantial ground for difference of opinion may exist on that point, because the appellate court might reasonably disagree with the Court's holding on the ground that, while Weintraub's act of sending the book-throwing student to Goodman for discipline was clearly required by his official duties, his duties as a teacher did not *require* him to take any further steps such as approaching Goodman about the situation or commencing a dispute-resolution proceeding. The supererogatory nature of those subsequent actions may prove sufficient to sustain the view that Weintraub was not acting pursuant to any duty when he performed those actions, and that his speech was therefore protected. Alternatively, the court could reasonably conclude that Weintraub's conversations with other teachers was sufficiently related to his employment duties that those conversations are also unprotected speech under *Garcetti*. Finally, appellate

review of this question at this point in the proceedings may advance the ultimate termination of this litigation, which has been pending for nearly seven years. If the action were to proceed to trial before Weintraub could appeal the Court's ruling, he would be precluded from presenting the bulk of his First Amendment retaliation claim to the jury. If the Second Circuit were to subsequently conclude on appeal that Weintraub's speech was protected, the case would need to be retried, resulting in a substantial waste of resources on the part of the Court and the parties to this action. The Court therefore encourages Weintraub to file an interlocutory appeal of this order, and respectfully requests the Second Circuit to exercise its discretion under § 1292 to review this order prior to trial. If the Second Circuit chooses to do so, this action shall be stayed until the appellate court has resolved the issues presented in Weintraub's appeal. 28 U.S.C. § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.").

4. The Parties Motions In Limine are Denied as Unripe

In anticipation of the trial of this case that was to commence on May 29, 2007, both parties have submitted motions *in limine* challenging the admissibility of various proposed exhibits. Because trial must now be postponed indefinitely pending appeal of this order, and because the outcome of that appeal may affect the evidence that both sides intend to introduce at trial, the motions *in limine* are hereby denied as not yet ripe for adjudication, without prejudice and with leave to renew when the trial of this case is rescheduled.

CONCLUSION

For the foregoing reasons, the City's motion to reconsider this Court's order denying summary judgment as to Weintraub's § 1983 claim for First Amendment retaliation is GRANTED. On reconsideration, the City's motion for summary judgment as to the § 1983 claim is GRANTED in part and DENIED in part. The parties' motions *in limine* regarding the admissibility of various proposed exhibits are hereby DENIED, with leave to renew those motions when the trial is rescheduled.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

David WEINTRAUB,

Plaintiff,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, Community School District No. 32, Lawrence Becker, Jerry Cioffi, Dawn Felder, Jamin Felder, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano,

Defendants.

No. 00-CV-4384 (ILG).

April 28, 2006.

MEMORANDUM AND ORDER

GLASSER, Senior District Judge.

INTRODUCTION

Plaintiff, David Weintraub ("Weintraub" or "plaintiff"), brings claims against defendants for retaliatory adverse employment action in violation of his First Amendment rights; false arrest and malicious prosecution in violation of state law, the Fourth Amendment of the Constitution, and 42 U.S.C. § 1983; and deprivation of his property and liberty in

violation of the Fourteenth Amendment and 42 U.S.C. § 1983.[1] The claims arise out of a series of events that took place when plaintiff was employed by the New York City Department of Education. Named as defendants are the Board of Education of the City School District of the City of New York (the "Board"); Community School District No. 32 (the "District"); Douglas Goodman, ("Goodman"), Assistant Principal of P.S. 274; Daisy O'Gorman ("O'Gorman"), the Principal of P.S. 274; Felix Vazquez ("Vazquez"), the Superintendent of Community School District No. 32; Frank Miller, ("Miller"), a New York Police Department school security officer at P.S. 274; Aida Serrano, ("Serrano"), a teacher at P.S. 274; Dawn Felder, the mother of a student at P.S. 274; Jamin Felder, a student at P.S. 274; Lawrence Becker ("Becker"), Chief Administrator for the Division of Personnel Investigations of the Board; and Jerry Cioffi ("Cioffi"), Deputy Superintendent of the Chancellor's District of the Board.

Before the Court is defendants' motion for summary judgment on all claims, pursuant to Fed. R. Civ. P. 56.

FACTS

---

[1] Plaintiff's Second Cause of Action generically alleged defendants violated 42 U.S.C. § 1983 in lodging a complaint of sexual abuse against him, but failed to identify any constitutional infringement. This issue was raised by defendants in their motion for summary judgment, and plaintiff has not responded to the argument. The claim is therefore dismissed for failure to state a claim. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'-for § 1983 by itself does not protect anyone against anything.").

I. Plaintiff's Initial Conflict With Goodman

In September, 1998, Weintraub began teaching fifth grade at PS 274 in Brooklyn. (56.1, ¶ 1). During his first few months at PS 274, Weintraub's relationship with administrators at PS 274 was unremarkable; he neither complained about anything out of the ordinary at the school, nor did he hear anything negative about his performance. (*Pl. Ex.* 11 at 49).

On Friday, November 6, 1998, Weintraub referred a student to Goodman for disciplinary action after that student threw a book at Weintraub in the classroom. The student returned to Weintraub's classroom shortly thereafter. (56.1, ¶ 1). That same student again threw books at Weintraub on Monday, November 9, 1998. Again Weintraub referred the student to Goodman, and again Goodman returned the student to Weintraub's class shortly thereafter. (56.1, ¶ 3).

In deposition testimony, Weintraub stated:

> "I was upset because a child was throwing books and I was upset that nothing was done about it. And I was upset that if this child could do this to me, that it would put the danger of [sic] other students at risk and, unfortunately . . . he put a kid in the hospital later in the year."

(Def. Ex. A at 51).

Weintraub states that he told Goodman that "[i]f nothing is going to be done about this, I will have to file a grievance because it is not an environment a teacher would want to go to where a child is allowed to throw a book at teachers." (Ex. A. at 47). Weintraub told other teachers at the school about the in-

cident and his intention to file a grievance, and filed that grievance through his union representative. (56.1, ¶ 4). Weintraub alleges that these complaints precipitated a series of retaliatory actions against him that were orchestrated by Goodman and other school officials. (*Pl. Ex.* 11 at 53-54).

II. The Breakfast Incident

On November 17, 1998, at 8:45 a.m., Weintraub wrote a ten-minute breakfast pass for a girl who said she had been accidentally locked out of school breakfast by security. Goodman immediately sent the child back to the classroom. Later that day, according to Weintraub, Goodman confronted him in a "snide, condescending voice," questioning his judgment and "yell[ing] at [him] . . . not to do that again." (*Pl. Ex.* 53). On November 30, 1998, Weintraub sent a letter to O'Gorman suggesting that Goodman's remarks were part of "a larger pattern of acts of intimidation, harassment, workplace abuse, and deliberate attempts to undermine [his] authority, which impairs [Weintraub's] ability to provide [his] student's [sic] with the education they deserve," and requested that she investigate the incident. (*Id.*). O'Gorman responded the next day, stating that she also believed that the breakfast pass was inappropriate and noting that Goodman "denies [the allegations of harassment] and indicates you are making these allegations because he has expressed his concern to you over the fact that every time he visits your classroom you are yelling at your students because you cannot control the class." (*Pl. Ex.* 54).

III. Allegations of Corporal Punishment

On November 19, 1998 Goodman wrote a letter to Weintraub and Weintraub's personnel file, in

which Goodman alleged that students had complained Weintraub was using corporal punishment in the classroom. Goodman instructed him to "improve [his] classroom management." (*Pl. Ex.* 2). Though the investigation and reporting of corporal punishment was generally handled by the school guidance counselor, (*Pl. Ex.* 75 at 53), Goodman personally filled out the required report documenting these allegations and submitted it to the Board of Education, Office of Special Investigation. (*Pl. Ex.* 3).

The allegations were deemed unfounded in January 1999, and Goodman was "directed to inform Mr. Weintraub by the Central Board in writing that he was not guilty of corporal punishment." (*Pl. Ex.* 7). To do so, he placed a letter in Weintraub's personnel file that stated, in part, "[o]ur investigations found that although there was no corporal punishment on your part, you did use poor judgement in the way you handled the situation with [the student]. In the future you must show more restraint in handling confrontational situations." (*Pl. Ex.* 5). Weintraub grieved this letter, particularly the allegation that he used poor judgment. O'Gorman met with Weintraub and a union representative on January 27, 1999 before denying the grievance on February 2, 1999. (*Pl. Ex.* 6). Weintraub filed for a Step II hearing, where, on February 24, 1999, the hearing officer sustained the grievance and ordered the letter removed from Weintraub's file. (*Pl. Ex.* 6, 7). At the Step II hearing, Goodman stated that "[he] was directed to inform Mr. Weintraub by the Central Board in writing that he was not guilty of corporal punishment. [He] decided to have it placed in his file so that it would be clear that [he] followed their directive. [He] did not know [he] could have given him this letter without it being placed on his file." (*Pl. Ex.* 7).

IV. O'Gorman and Goodman's Classroom Evaluations of Weintraub

A. O'Gorman's observation of Weintraub

On November 19, 1998, O'Gorman placed a letter in Weintraub's personnel file regarding "pedagogical inadequacies" and threatening an unsatisfactory evaluation if Weintraub's practices didn't improve. (*Pl. Ex.* 32, 33). O'Gorman stated that she "visited [Weintraub's] classroom and observed its floor covered with garbage indicating [his] failure to maintain proper student discipline and classroom management." (*Pl. Ex.* 32). The letter also said that O'Gorman had "informally observed [Weintraub's] classroom and found that students are always talking to one another and that students are out of their seats whenever [she] visit[ed]," and alluded to "several parents" who "have visited [her] office demanding [Weintraub's] removal after arguing to [her] that their children are not learning anything in [Weintraub's] classroom." (*Id.*).

Weintraub grieved this letter. The grievance was ultimately arbitrated, and the arbitrator determined that "the November 19, 1998 Observation Report . . . from Ms. O'Gorman [was] unfair." The arbitrator ordered the deletion of most of the letter placed in Weintraub's file. (*Pl. Ex.* 13). Rather than delete the unfair portion of the letter, thin lines were drawn through the offensive material. (*Pl. Ex.* 35).

B. Goodman's observation of Weintraub

On December 7, 1998, Goodman observed Weintraub's class and filed a formal observation report. (*Pl. Ex.* 36). Goodman's report contains both positive and critical statements regarding the classroom environment and lesson that he observed, but con-

cludes overall that "[t]he reading lesson I observed was unsatisfactory." (*Id.*).

Weintraub challenged this conclusion. At the Step II grievance hearing that was held on January 26, 1999, the hearing officer sustained Weintraub's grievance, stating that "[t]his observation report as written does not warrant an overall unsatisfactory rating." (*Pl. Ex.* 37).

C. O'Gorman's year-end evaluation of Weintraub for 1998-99

Based on the single classroom evaluation that had been conducted by Goodman in November 1998, O'Gorman produced two conflicting year-end evaluations in June of 1999. On the first evaluation, received by Weintraub on June 14, 1999, O'Gorman rated Weintraub unsatisfactorily in 18 of 23 categories and recommended denial of certification of completion of probation.[2] (*Pl. Ex.* 50). O'Gorman gave a copy of that evaluation to Weintraub, but district Superintendent Vazquez never adopted that evaluation as required by school policy. (*Id.*). Instead, a week later, O'Gorman delivered to Weintraub a revised evaluation, this time rating him unsatisfactorily on only 6 of 23 categories and recommending only the discontinuation of probationary service. (*Pl. Ex.* 51). This evaluation was adopted by Vazquez. (*Id.*). Vazquez did not recall in his deposition whether he

---

[2] The "denial of certification of completion of probation" would have revoked Weintraub's license to teach anywhere for the New York City Public Schools. The less severe recommendation of "discontinuation of probationary service," only discontinues a recipient's service in the particular school district, without preventing him from obtaining a position elsewhere in the New York City public schools. (*Pl. Ex.* 42 at 53-54)

had seen the earlier version of the review. (*Pl. Ex.* 42 at 52-53).

A year later, in June of 2000, an independent "Chancellor's committee" reviewed O'Gorman's evaluation of Weintraub and observed "the complete lack of any evidence or documentation" to support the unsatisfactory ratings and recommendation of discontinuation, and "unanimous[ly] nonconcurr[ed] with the recommendation to discontinue probationary service." (*Pl. Ex.* 52.)

V. Allegations of Sexual Abuse

On January 8, 1999, Goodman reported to the Special Commissioner of Investigation for the New York City School District that a former student of Weintraub's, Jamin Felder, had informed his mother, Dawn Felder, that Weintraub had sodomized him. (*Pl. Ex.* 55). According to the filed report, Goodman had been informed of the complaint by the school guidance counselor, Ms. Lauria. Goodman further stated that the student had previously complained in October 1998 that Weintraub had "flirted" with him, though Goodman did not report the previous incident, because at the time Goodman found no corroboration of the student's allegations. (*Id.*). As a result of this report, Weintraub was immediately reassigned to duty in the nurse's office at PS 274, and subsequently transferred on January 21, 1999 to work at district Superintendent Vazquez's office for the rest of the school year while the charges were investigated. (*Pl. Ex.* 19 at 82, 41, 42 at 21).

Lauria, the guidance counselor, testified in her deposition that she recalls Felder making graphic allegations that a teacher sodomized him, but does not recall that Felder identified Weintraub as the assai-

lant, and recalls neither discussing these allegations of abuse with Goodman nor any earlier allegations of flirtation made by Felder against Weintraub. She further stated that she would generally discuss such serious allegations with the principal, not the assistant principal. (*Pl. Ex.* 75 at 32-35).

Investigators interviewed Felder several times. They found that he "was not consistent in relating the facts," and in the absence of any evidence or witnesses, closed the investigation. (*Pl. Ex.* 55).

Though plaintiff was cleared of any wrongdoing by the investigators, and though defendant Vazquez, the district Superintendent, was notified that the investigation had been closed sometime near the end of the 1998-1999 school year, there is no record of Vazquez or any other administrator notifying Weintraub of the investigation's outcome, nor was Weintraub returned to the classroom. (*Pl. Ex.* 42 at 24-25, 43).

VI. Allegations of Abandonment

On January 11, 1999, prior to Weintraub's transfer to the district office as a result of the sexual abuse allegations, Goodman placed a letter in Weintraub's personnel file alleging that Weintraub "[o]n two occasions last week abandoned [his] class." (*Pl. Ex.* 8). Goodman stated in the letter that "[o]n Thursday, 1/7/99 I was in the process of observing Ms. Chess. Your class came down unescorted." And on January 8, 1999, Goodman also "observed [Weintraub's] class walking toward Ms. Serrano's room," again, without Weintraub present. (*Id.*).

Goodman's letter was accompanied by two letters from the named teachers, Ms. Chess and Serrano. The letter from Chess stated that she didn't see Weintraub when his class was brought to her room

on January 7, 1999. The letter from Serrano stated that on January 8, 1999, Weintraub did not bring his students directly to her class but "stood on the other side of the swinging doors," while the students filed in, and that four students did not arrive at her class. (*Pl. Ex.* 9, 10). Weintraub denies that the event with Serrano ever happened. (*Def. Ex.* B at 49-50). At least one teacher offered a letter stating that Weintraub did not abandon his class on January 8, 1999. (*Pl. Ex.* 12).

Weintraub contested the letters placed in his file. At the Step II hearing held on February 24, 1999, he stated that the letters from Goodman, Chess, and Serrano were inaccurate "because [he] did not abandon [his] class. On the two dates in question [he] did make sure [his students] got to their classes. They were in sight at all times." (*Pl. Ex.* 34). Goodman reiterated his position from the letter and read a dictionary definition of "abandonment" into the record. The hearing officer found it "clear" that Weintraub did not abandon his class, but also that he did not properly escort his class, in violation of school rules and procedures. The grievance was denied, but the hearing officer ordered the letter to his personnel file to be "re-written deleting all sentences that have the words abandoned or abandonment in them." (*Pl. Ex.* 34).

VII. Allegations of Assault

On June 25, 1999, Weintraub and Serrano encountered each other in the vicinity of a bodega off school grounds, but near P.S. 274 and the district office to which Weintraub had been reassigned. (*56.1*, ¶ 7). Though both parties acknowledge their presence at the location that day, the details of the encounter are sharply disputed. Serrano claims that as

Weintraub passed her on the sidewalk, he stabbed her in the back with a pencil and said "Now you know how it feels to be stabbed in the back," though she also states that Weintraub would have had no motive to have done such a thing or made such a statement. (*Def. Ex.* D at 37, 33).

Plaintiff claims that he passed by Serrano on the sidewalk, and when he had passed, at a distance of 20-25 feet, Serrano inexplicably started screaming at him "You hit me . . . You f-ing hit me," to which he replied "What are you f-ing talking about?" and then entered the bodega to purchase lunch (*Pl. Ex.* 11 at 93-94). When he came out of the store a few minutes later, Weintraub stated that Serrano was still on the corner and continued to yell at him, so he crossed the street and returned to his office. (*Def. Ex.* B at 97). At his deposition, Weintraub denied that there was ever any physical contact between the parties or that he ever made a statement about stabbing Serrano in the back. (*Def. Ex.* B at 96).

Serrano stated in her deposition that she returned to the school and informed O'Gorman and Goodman about the event. (*Def. Ex.* D at 38-39). Goodman summoned Miller, who recorded in his logbook that Goodman then called 911. (*Def. Ex.* F at 19-20). Serrano described the events and her alleged injury to the NYPD officers and Miller, (*Def. Ex.* D at 40-41), and told the officers that she wanted Weintraub arrested and emergency medical services ("EMS") attention. (*Def. Ex.* D at 42, *Def. Ex.* E at 22-23). After the police officers left, EMS responded. (*Def. Ex.* E at 23). In her deposition, Serrano stated that she was examined by the EMS technician, who indicated a welt on Serrano's back, and broken skin,

but no bleeding. Serrano received no medical treatment for the alleged injury. (*Def. Ex.* E at 42).

Miller recalls that after Serrano described the allegations for him and the other NYPD officers, but before EMS responded, he and the other officers left O'Gorman's office and the NYPD sergeant asked Miller if Weintraub should be arrested. (*Def. Ex.* E at 24, 27). Miller responded affirmatively, and the sergeant asked Miller if Miller wanted the arrest. Again Miller said yes. (*Def. Ex.* E at 24).

Whether Serrano accompanied the officers to arrest Weintraub is disputed; she denies accompanying the officer, but the NYPD sergeant recalls that she went with them. (*Compare Def. Ex.* D at 43 *with Pl. Ex.* at 33). At least Goodman and Miller went across the street with NYPD officers. Goodman summoned Weintraub from his office, and the police asked Weintraub if he knew why they were there. Weintraub responded negatively, stating that "[he] didn't know what [they were] talking about." (*56.1*, ¶¶ 13-15, *Pl. Ex.* 25). Miller later adopted a statement that in making the arrest, he was not only informed by Serrano's complaint, but that he was "further informed by [Weintraub's] own admissions that [he] stabbed informant about the back with [a] pencil." (*Pl. Ex.* 24, 25). There is no evidence of any such admission by Weintraub in the record.

Miller arrested the plaintiff, transported him to central booking, where he was charged with misdemeanor attempted assault, a harassment violation, and misdemeanor possession of a weapon. (*56.1*, ¶ 15; *Pl. Ex.* 24, 29). Serrano went to the precinct with other officers and signed an information/complaint against Weintraub. (*Def. Ex.* D at 46). Ultimately, in

December of 1999, the charges were dismissed and the record sealed. (*Pl. Ex.* 14).

VIII. Weintraub's Transfer and Termination From School District 32

On July 1, 1999, as a result of the arrest, Vazquez received a recommendation from an administrator in the Office of Personnel Investigations to "reassign Weintraub to a location where [he] will neither be in the vicinity or have any contact with students." (*Pl. Ex.* 57). Vazquez testified that it was the policy of the Board not to terminate teachers for having been charged with a misdemeanor, but to await disposition of case to make a determination. (*Pl. Ex.* 42 at 122-23). Nonetheless, a handwritten memo indicates Vazquez's intention to conduct a Technical Assistance Conference ("TAC") in Weintraub's case, a requisite step to terminating Weintraub's probationary license to serve within the New York City public schools. (*Pl. Ex.* 52, 56). Without conducting a TAC, a probationary employee whose services are discontinued from one district would be eligible to serve in any other school that consents to employ him. (*Pl. Ex.* 56). Vazquez's testimony does not indicate that a TAC was actually held in Weintraub's case and there is no record that one was ever held. (*Pl. Ex.* 72).

On July 19, 1999, Weintraub was terminated from employment in Community School District 32 by Superintendent Vazquez without any stated reason. (*Pl. Ex.* 59, 42 at 43). Vazquez later testified that Weintraub "was terminated for poor performance as a teacher. The arrest is another issue." (*Pl. Ex.* 42 at 79).

IX. Weintraub's Termination from the Chancellor's District

Despite being terminated from School District 32, Weintraub retained his probationary license and later that summer, obtained a position at Public School 85 in the Chancellor's District in the Bronx. (*Pl. Ex.* 61, ¶ 5).[3] He began teaching there on September 7, 1999.

On September 25, 1999, Weintraub filed a notice of claim for false imprisonment against the City in New York Supreme Court. (*Pl. Ex.* 65).

On October 1, 1999, defendant Deputy Superintendent of the Chancellor's District Jerry Cioffi was informed of the charges stemming from Weintraub's prior arrest. Cioffi conferred with defendant Lawrence Becker, Chief Administrator for the Division of Personnel Investigations, and they terminated Weintraub pending resolution of the outstanding unresolved arrest. (*Pl. Ex.* 61, ¶¶ 6, 11). At the time he terminated Weintraub, Cioffi "understood that [Weintraub's arrest] was an arrest for some sort of serious charge" from his conversation with Becker. (*Pl. Ex.* 64 at 20). By affidavit, Cioffi testified that "[his] decision to terminate petitioner's service had nothing to do with the [lawsuit Weintraub had filed], and solely with respect to petitioner's outstanding and unresolved arrest. [sic]." Local administrators at Public School 85 indicated to Cioffi that if Weintraub was cleared, they would take him back. (*Pl. Ex.* 63 at 41-42).

---

[3] "The Chancellor's District is a group of schools that have been placed under the direct jurisdiction of the Chancellor of the Board of Education in an effort to improve educational achievement in these particular schools." (*Pl. Ex.* 61, ¶ 2).

On November 5, 1999, The New York State Department of Labor determined that plaintiff was "discharged for misconduct in connection with [his] employment" and denied his application for unemployment benefits. The reason given for the determination was that Weintraub had been "discharged for having an arrest record." (*Pl. Ex.* 73). On November 19, 1999, the Department of Labor amended the reason for its determination, stating that "new information shows that [plaintiff was] discharged for failure to notify [his] ex-employer . . . of [his] arrest which is a violation of Chancellor Regulation C-105. Although [Weintraub] stated that [he] did inform them about [his] arrest, [he] refused to let this office to make copies of alleged proof showing [he] informed [sic]." (*Pl. Ex.* 73). On December 12, 1999 the Department of Labor withdrew its determination pending further fact finding. (*Pl. Ex.* 74).

After the criminal charges against Weintraub were dismissed, he informed Becker of the dismissal and requested reinstatement to teach. (*Pl. Ex.* 70). Cioffi also became aware that the charges had been dismissed. (*Pl. Ex.* 63 at 37). Nonetheless, Weintraub was not restored to his job at P.S. 85. (*Pl. Ex.* 67 at 75).

PROCEDURAL HISTORY

In an earlier CPLR Article 78 state court proceeding, Weintraub sought review of the Board's dismissal of him, alleging that the termination was in bad faith and in retaliation for his having served upon the Board a notice of claim for false imprisonment related to his June, 1999 arrest. (*See Def. Ex.* L). In that proceeding, the state court held that Weintraub was "unable to generate any evidence that his termination was retaliatory for having

served a notice of claim." (*Id.* at 4). Defendants argue that the adverse finding in the Article 78 proceeding collaterally estops plaintiff from litigating before this Court whether he was terminated in retaliation for serving the notice of claim.

> Under New York law, the doctrine of issue preclusion only applies if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. Issue preclusion will apply only if it is quite clear that these requirements have been satisfied, lest a party be precluded from obtaining at least one full hearing on his or her claim.

Colon v. *Coughlin*, 58 F.3d 865, 870 (2d Cir. 1995).

The issue presented in the Article 78 proceeding was narrowly framed. Weintraub sought review only of whether he was discharged in bad faith, or with improper reason, for filing a notice of claim that preserved his right to sue the Board for false imprisonment. No issues were raised related to the alleged First Amendment retaliation, false imprisonment or Fourth Amendment violations, or constitutional due process rights allegedly violated in the course of his termination. Thus, preclusive effect is not given to the issue litigated in the Article 78 proceeding because the issue that was in question at the Article 78 proceeding is distinct from the issues presented to this court.

DISCUSSION

X. Summary Judgment Standards

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

A moving party is entitled to judgment as a matter of law if the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which he has the burden of proof. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). The court, however, views all of the evidence presented in the light most favorable to the party against whom summary judgment is sought, and draws all reasonable inferences in his favor, in light of the "factual context" in which the claims arose. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A genuine issue of material fact exists when there is sufficient evidence favoring the nonmoving party such that a jury could return a verdict in its favor. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Where a genuine issue of material fact exists, summary judgment is inappropriate.

XI. Plaintiff's Claims Under 42 U.S.C § 1983

To state a claim under § 1983, plaintiff must allege (1) a violation of his constitutional rights (2) by a person acting under color of state law. *See Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981); *Dwares* v. *City of New York*, 985 F.2d 94, 98 (2d Cir. 1993).

A party may be liable for the acts of those whom he supervises. Though "supervisor liability in a §

1983 action depends on a showing of some personal responsibility, and cannot rest on respondeat superior," *Richardson* v. *Goord*, 347 F.3d 431, (2d Cir. 2003), liability may be established by showing any of the following:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

Hernandez v. *Keane*, 341 F.3d 137, 145 (2d Cir. 2003). *See also Colon* v. *Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

Similarly, the rule of respondeat superior does not apply to hold municipalities liable in Section 1983 actions. *See Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). However, a municipality may be held liable for relief where the "action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. Even where the policy "has not received formal approval through the body's official decision-making channels," a municipality may be liable when "execution of a government's policy or custom . . . by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . ." *Id.* at 691, 694 (citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S.

144, 167-68 (1970)). An official's acts may fairly be said to represent official policy "where an official has final authority over significant matters involving the exercise of discretion." *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983). And a "single unlawful discharge," if ordered by such a person, "can, by itself, support a claim against a [municipality]." *Id. See also Dangler* v. *New York City Off Track Betting Corp.*, 193 F.3d 130, 143 (2d Cir. 1999) (holding that adverse retaliatory employment decisions made by administrators were the responsibility of the municipal corporation). Finally, where, as here, a plaintiff alleges a constitutional violation from a municipality's failure to train its employees, the failure to train employees provides a basis for § 1983 liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [personnel] come into contact." *City of Canton* v. *Harris*, 489 U.S. 378, 388, 390-91 (1989).

A. First Amendment Retaliatory Action Claim

Weintraub alleges that he suffered adverse employment action by Goodman, O'Gorman, Vazquez, and the Board for exercising his First Amendment rights. Because it is undisputed that Goodman, O'Gorman and Vazquez acted under color of state law for the purposes of this claim, the Court only discusses whether their acts may have constituted a First Amendment violation.

"The mere fact of government employment does not result in the evisceration of an employee's First Amendment rights." *Johnson* v. *Ganim*, 342 F.3d 105, 112 (2d Cir. 2003) (citing *Hale* v. *Mann*, 219 F.3d 61, 70 (2d Cir. 2000)). And while the First

Amendment does not "require a public office to be run as a roundtable for employee complaints over internal office affairs," *Connick* v. *Myers*, 461 U.S. 138, 149 (1983), a "public employee who arranges to communicate privately with his employer rather than to spread his views before the public" still enjoys the benefit of free speech. *Givhan* v. *Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979). The enterprise of the Court "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 569 (1968).

On a First Amendment employment retaliation claim, the employee bears the initial burden of demonstrating that "(1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest, (2) he or she suffered an adverse employment action, and (3) the speech was at least a substantial or motivating factor in the adverse employment action." *Morrison* v. *Johnson*, 429 F.3d 48, 51 (2d Cir. 2005) (per curiam) (citations omitted). Because Weintraub was reassigned, transferred, and terminated, there is no doubt that he suffered adverse employment actions. As such, only the first and third prongs need be discussed.

1. Was Weintraub's speech protected by the First Amendment?

A public employee speaks as a citizen on a matter of public concern if the speech "relat[es] to any matter of political, social, or other concern to the

community." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Broadly stated, matters of public concern are matters that are the "subject of legitimate news interest; that is, [the] subject of general interest and of value and concern to the public at the time of publication." *City of San Diego* v. *Roe*, 543 U.S. 77, 83 (2004). Protection is afforded public employees when speaking on matters of public concern partly in consideration that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." *Id.* at 82.

Speech on matters of public concern is contrasted with speech on matters of interest solely to the employee, as to which the government, as an employer, has greater latitude to take action. *See Connick*, 461 U.S. at 146, 147-48. When an employee's comments are motivated not by some "altruistic" desire to improve the public service or protect the public, but rather strictly by personal emotions or interest, the First Amendment does not protect the employee from corresponding administrative action. Thus, for example, disruptive complaints from employees seeking to advance their personal stake, complaints about matters unconnected to public policy, and unprotected commercial speech are actionable by public employers. *See, e.g., Connick*, 461 U.S. at 138 (desire for specific job assignment not matter of public concern); *Hellstrom* v. *U.S. Dept. of Veterans Affairs*, 46 F. App'x 651, 656 (2d Cir. 2002) (unpublished disposition) (questioning of director's competency in light of personnel disagreement was motivated by personal interests and anger, and not some desire to improve VA or protect the public); *Saulpaugh* v. *Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993) (com-

plaints of sexual harassment were personal in nature and did not implicate broader policies of the hospital); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1060 (2d Cir. 1993) (speech regarding private commercial transactions not related to a matter of public concern); *Ezekwo* v. *New York City Health & Hospitals Corp.*, 940 F.2d 775 (2d Cir. 1991) (speech of medical resident identifying unsatisfactory programmatic conditions not a matter of public concern where they related to her own situation in the program).

The determination of which category into which particular speech falls "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. This is a fact-intensive question to be decided as a matter of law by the Court. *See Morris* v. *Lindau*, 196 F.3d 102, 110 (2d Cir. 1999) (citing *Connick*, 461 U.S. at 148 n.7.

There is no doubt that the content of Weintraub's statement to Goodman relates to a matter of public concern, namely discipline in the public schools. The topic is the subject of extensive public comment, policy debate, and persistent coverage in the media. *See, e.g.*, David M. Herszenhorn, *His Leverage Secure, the Mayor Continues to Press Public Schools*, N.Y. Times, Jan. 4, 2006, at B1 ("Behavior-problem kids are without a question the worst issue for teachers trying to teach lessons."); Betsy Gotbaum, Public Advocate, *School Violence is a Crime Against our Children*, Newsday, April 4, 2005, at A40; David M. Herszenhorn, *Problems of School Discipline System Emerge at Hearing*, N.Y. Times, Jan. 29, 2004, at B6; Susan Saulny, *City Adapts a Police Strategy to Violent Schools*, Oct. 19, 2004; Bryan Virasami, *A*

Tougher Course / Mayor Announces Aggressive Plan on School Discipline, Newsday, Dec. 24, 2003, at A5. It is a subject on which the media has specifically demonstrated an interest in the opinions and perspectives of teachers. *See, e.g.*, Letter from former teacher Pamela Brown to the N.Y. Times, *Curbing Violence in City Schools*, Jan. 7, 2004, at A20; Letter from New York City Public School Teacher Wendy Holtzman to the N.Y. Times, *Violence in the Schools*, Jan. 9, 2004, at A18. Moreover, the specific issue of student violence against teachers presents an issue of public concern in its own right. *See, e.g.*, David M. Herszenhorn, *Union Cites Growing Violence on Teachers*, N.Y. Times, Oct. 10, 2003, at B7; Letter from teacher Karen Leon to the N.Y. Times, Jan. 6, 2004, at A20 ("Is there a benchmark for how serious an injury against a staff member must be before students are removed? It might be helpful for teachers to know how much physical harm they must endure [before action is taken against a student]."). Thus, it cannot seriously be contested that the content of speech questioning an administrative response, or lack thereof, to discipline problems in the classroom relates to a matter of public concern, regardless of whether that speech comes from a elected official, citizen, or teacher.

The form and context of Weintraub's statements do not dissuade the Court from finding Weintraub's speech related to a matter of public concern. As noted in *Givhan*, the fact that an employee chooses to express his concerns privately, as opposed to publicly, does not mean that the speech is not motivated by public concern or unprotected as free speech. *Givhan*, 439 U.S. at 415-16. The most that can be said about the form and context of Weintraub's statements, however, is that he restrained himself to di-

rect, respectful, private communication with Goodman, and when he was unsatisfied with the results of that complaint, he spoke with other teachers and lodged a grievance through the appropriate established channels for remedying administrative failures.

Moreover, there is no evidence that Weintraub was primarily motivated by a desire for some personal gain, or to obtain a benefit that he would enjoy exclusively, in speaking to Goodman. To the contrary, Weintraub's undisputed testimony establishes that his primary motivation was a general concern for safety in the classroom and school. While Weintraub would certainly have enjoyed a safer classroom and more appropriate teaching environment from the enforcement of disciplinary policy, these are not personal benefits in any traditional sense of the word. Rather, they are a change in conditions that would benefit not only Weintraub, as a teacher, but all of the students in the classroom, and by extension the rest of the school and the community.

Considering the content, context, and form of Weintraub's speech, in light of all of the facts disclosed by the record, the Court finds that Weintraub's complaint to Goodman and subsequent grievance were protected by the First Amendment.

2. Was Weintraub's speech a substantial or motivating factor in the adverse employment action?

The question of whether Weintraub's speech was a substantial or motivating factor in the adverse employment action is a question of fact generally left to a jury to resolve, as "without a searching inquiry into these motives, those intent on punishing the exercise

of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations." *Piesco* v. *City of New York, Dept. of Personnel*, 933 F.2d 1149, 1155 (2d Cir. 1991) (quoting *Peacock* v. *Duval*, 694 F.2d 644, 646 (9th Cir. 1982) (quoting *Mabey* v. *Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976))). Nonetheless, to defeat a motion for summary judgment, plaintiff "may not rely on conclusory assertions of retaliatory motive, but must offer instead some tangible proof to demonstrate that [his] version of what occurred was not imaginary." *Morris* v. *Lindau*, 196 F.3d at 111. "Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus." *Id.*

Weintraub faced increasingly serious charges, which were each successively determined unfounded, after speaking to Goodman about Goodman's failure to discipline the student. A jury could infer that Goodman initially intended to punish Weintraub for his speech with minimal retaliatory action, but when Weintraub was vindicated against each improper act, a more egregious action followed in furtherance of Goodman's improper motive. Similarly, O'Gorman was involved with many of the events, and supervised Goodman throughout the time period. A jury could find her either directly liable, or liable under a theory of supervisor liability for failure to act on Weintraub's complaints or gross negligence in her supervision of Goodman.

Vazquez and the Board are also implicated on the First Amendment retaliation claim, as a jury could infer that the retaliatory acts were the cause of

Weintraub's dismissal, and that Vazquez either knew of the retaliatory motive, or was grossly negligent in his failure to investigate and act upon all of Weintraub's grievances. Similarly, because Vazquez was vested with the authority and discretion to terminate Weintraub, if he exercised his discretion in violation of plaintiff's constitutional rights, the Board could be held liable on a theory of municipal liability.

Because defendant has failed to establish an absence of undisputed material facts, the motion for summary judgment on the first claim must be denied.

B. Fourth Amendment false arrest and malicious prosecution claims

Plaintiff asserts that O'Gorman, Goodman, Serrano, Miller and the Board caused him to be falsely arrested and maliciously prosecuted, and in so doing, deprived him of liberty and property in violation of the Constitution. These claims allege a violation of the Fourth Amendment, which protects "the right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Cons. Am. IV. *See also Albright* v. *Oliver*, 510 U.S. 266, 274 (1994) (constitutional right at issue in § 1983 suit for false imprisonment and malicious prosecution is the Fourth Amendment right).

1. The false arrest claim

Under New York law, the elements of a false arrest or false imprisonment claim are "(1) the defendant intended to confine [the plaintiff], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir.

1995). That the first three elements are established is not in dispute.

Miller contends he had probable cause to make the arrest, which would privilege the confinement. *See, e.g., Bernard* v. *United States*, 25 F.3d 98, 102 (2d Cir. 1994) ("There can be no federal civil rights claim for false arrest where the arresting officer had probable cause."). Plaintiff denies that Miller had probable cause, and suggests that at best, the existence of probable cause is a matter of factual dispute that must be resolved by the jury.

Under New York law, a police officer may arrest a person for "[a] crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." N.Y. Crim. Proc. L. § 140.10. The definition of "reasonable cause" is the equivalent of "probable cause" in the federal framework. *People* v. *Johnson*, 488 N.E.2d 439 (N.Y. 1985). The probable cause requirement is satisfied if the officer "received his information from some person, normally the putative victim or eyewitness, who it seems reasonable to believe is telling the truth . . . The veracity of citizen complaints who are the victims of the very crime they report to the police is assumed." *Miloslavsky* v. *AES Engineering Society*, 808 F. Supp. 351, 355, *aff'd* 993 F.2d 1534 (2d Cir. 1993) (internal citation omitted). *See also Caldarola* v. *Calabrese*, 298 F.3d 156, 163 (2d Cir. 2002) (citing *Miloslavsky*).

"Probable cause 'does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been . . . committed' by the person arrested." *People* v. *Shulman*, 843 N.E.2d 125 (N.Y. 2005) (citing *People* v. *Bigelow*, 488

N.E.2d 451 (N.Y. 1985)). "When determining whether the police had probable cause to arrest, the 'inquiry is not as to defendant's guilt but as to the sufficiency for arrest purposes of the grounds for the arresting officer's belief that [the defendant] was guilty.'" *Shulman*, 843 N.E.2d at 133 (citing *People* v. *Coffey*, 191 N.E.2d 263 (N.Y. 1963)); CPLR § 140.10(1)(b). "The question of whether or not probable cause existed may be determinable as a matter of law if there is no dispute as to the pertinent events and the knowledge of the officers." *Weyant* v. *Okst*, 101 F.3d 845, 852 (2d Cir. 1996). However, where the question of whether probable cause existed or not is predominantly factual in nature, it is appropriately presented to a jury. *See, e.g., Moore* v. *Comesanas*, 32 F.3d 670, 673 (2d Cir. 1994) (whether or not probable cause existed properly presented to the jury when officer relied upon ambiguous warrant and conflicting accounts of the parties' behavior and statements at the scene of the arrest).

There is no significant factual dispute over the fact that Miller received his information from Serrano, the putative victim, who recounted the allegations before Goodman, O'Gorman, Miller, and an assembly of police officers. Rather, plaintiff argues that because Serrano and Miller never directly addressed each other in dialogue, it was unreasonable for Miller to rely upon her recounting of the events in developing probable cause to arrest Weintraub. Such a strict standard is not required by the law. *Cf. People v. Ketcham*, 712 N.E.2d 1238 (N.Y. 1999) (probable cause may be based on hearsay upon demonstrating the reliability of the hearsay informant and the basis of the informant's knowledge). Here, Miller's testimony is undisputed that though Serrano did not di-

rectly address him, she recounted her version of the events in his presence. (*See Def. Ex.* F at 22).

Plaintiff also argues that the circumstances under which Miller received the information suggest that Serrano's veracity was in doubt, and that because those circumstances were suspicious, it was unreasonable for Miller to have found probable cause prior to making a more thorough investigation of the allegations. Weintraub bases this argument both on the pattern of allegations defendants had made against him, Serrano's previous involvement in one of those allegations, and the fact that the allegations were later proved to be unfounded, spurious, or exaggerated. On this point, *Singer* is instructive. *See Singer* v. *Fulton County Sheriff*, 63 F.3d 110 (2d Cir. 1995).

In *Singer*, where plaintiff sued for false arrest, a store employee had offered a deposition to the arresting officer in which the employee "recounted that Singer presented him with a list of items he was taking and asked if he could come back later to pay for them; according to [the employee], he expressly told Singer it was not all right for [him] to take the food items from the store without paying." *Id.* at 119. To contest probable cause, Singer offered evidence that his arrest was motivated by the employee's, officer's, and community officials' history of hostility to his political beliefs. The Second Circuit held that the deposition provided probable cause, notwithstanding that the evidence established "circumstances of [the] arrest [that] raise[d] questions as to the motivation of the arresting officer, the village officials, and even the store employees . . . [M]otivation is not a consideration in assessing probable cause." *Id.*

Here, the circumstances establishing probable cause are even less suspect than in Singer, because beyond plaintiff's speculation, there is no evidence that Miller knew of the deteriorated relationship between the parties or that Miller had an improper motive for making the arrest. Moreover, the circumstances in which Miller learned of the event, hearing Serrano recount the allegations before an assembled group of authorities including law enforcement officials and her supervisors, would tend to bolster an officer's presumption that the alleged victim was telling the truth. Were she not, she would be opening herself up to the legal liability alleged in this lawsuit, as well as, one might presume, disciplinary administrative action.

Because Miller was present when a putative victim recounted her personal recollection of the crime, and because an officer may generally presume a victim's reliability when she describes an offense, and moreover because this presumption was bolstered by the circumstances under which the victim spoke, the Court finds, in the absence of any evidence that Miller acted with improper motivation, that Miller's arrest was privileged with probable cause. Miller cannot be held liable for either a violation of plaintiff's rights under 42 U.S.C. § 1983, or for false arrest under state law.

O'Gorman, Goodman, and Serrano assert that they cannot be held liable for false arrest under state law or for violation of Weintraub's Fourth Amendment rights under § 1983. They cite precedent that "[a] civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be

made and criminal charges filed, will not be held liable for false arrest or malicious prosecution," and implicitly disclaiming that, as civilians, they acted under color of state law. *Du Chateau* v. *Metro-North Commuter R.R. Co.*, 253 A.D.2d 128, 131, 688 N.Y.S.2d 12 (2d Dept. 1999); *See also Mesiti* v. *Wegman*, 307 A.D.2d 339, 763 N.Y.S.2d 67 (2d Dept. 2003); *Schiffren* v. *Kramer*, 225 A.D.2d 757, 640 N.Y.S.2d 175 (2d Dept. 1996).

While it is true that citizens who furnish information to the police in good faith will not generally be held liable for false arrest when the police exercise independent judgment to arrest a defendant, even if the defendant is ultimately found not guilty, the cases cited by defendants are distinguishable and inapplicable to the facts here. In *DuChateau*, where DuChateau brought a civil suit after the conductor on a commuter train reported to police that he had assaulted her by grabbing her arm, neither the underlying facts nor the conductor's good faith account of the events were in dispute; and the police independently exercised their judgment to make an arrest. The court explicitly distinguished that case from cases in which the civil defendant "commenced the proceeding against the plaintiff or . . . instigated the arrest." *DuChateau*, 253 A.D.2d 128 at 131, 688 N.Y.S.2d 12. Here, Weintraub complains that the defendants instigated the arrest, and did so based on facts that they knew were false. *Mesiti* actually cuts against defendants' argument, as that opinion affirmed a jury verdict against the civil defendant for false arrest and false imprisonment where the defendant had "acted with undue zeal by affirmatively instigating the plaintiff's arrest." *Mesiti*, 307 A.D.2d at 341. And in *Schiffren*, where the plaintiff brought a false imprisonment claim against individuals who

had allegedly contributed to his false arrest, the court granted summary judgment for one party, an attorney who provided information to police in response to an investigator's question, noting the attorney's "limited involvement" in the arrest and that it was unclear whether the defendant spoke with the police "prior to or after the plaintiff's arrest." *Schiffren*, 225 A.D.2d at 758, 640 N.Y.S.2d 175. Here, Weintraub alleges defendants contacted the police in an effort to have him arrested.

Contrary to defendants' argument, even where there is no claim that a defendant actually restrained or confined a plaintiff, a claim of false arrest or false imprisonment may lie where a plaintiff can "show that . . . defendants instigated his arrest, thereby making the police . . . agents in accomplishing their intent to confine the plaintiff." *Carrington* v. *City of New York*, 201 A.D.2d 525, 527, 607 N.Y.S.2d 721 (2d Dept.1994). Such an action will lie where the defendants "lacked reasonable cause for their belief in the plaintiff's culpability." *DeFilippo* v. *County of Nassau*, 183 A.D.2d 695, 696-97, 583 N.Y.S.2d 283 (2d Dept.1992). *See also King* v. *Crossland Sav. Bank*, 111 F.3d 251, 255 (2d Cir. 1997).

The truth of what actually occurred on the sidewalk between Serrano and Weintraub is disputed. If a jury were to believe Weintraub's account, rather than Serrano's, it would reasonably infer that Serrano knew Weintraub had not assaulted her, but nonetheless intended to have him arrested by making false statements to the police. Moreover, given Serrano's role in supporting the prior exaggerated allegation of abandonment Goodman levied against Weintraub, Goodman and O'Gorman's pattern of filing unsubstantiated charges against Weintraub, and

the fact that Serrano returned to the school and went to O'Gorman's office to report the alleged crime, rather than contacting the police directly, there is more than a modicum of evidence on which a jury could infer the intent of Goodman and O'Gorman to have Weintraub falsely arrested. Because there are factual disputes that, if resolved in Weintraub's favor, would warrant a finding that the defendants intentionally caused his false arrest, the Court denies summary judgment for Goodman, O'Gorman and Serrano on the Fifth Claim, for false imprisonment under state law.

Plaintiff also alleges that defendants, for their role in his arrest, violated 42 U.S.C. § 1983. There is no doubt that a false arrest constitutes a violation of an individual's Fourth Amendment constitutional rights, but plaintiff must also establish that defendants acted under color of state law. Private parties acting alone may not violate § 1983's state action requirement. *See, e.g., Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983). However, when the alleged constitutional deprivation may be "fairly attributed" to the state, a private party may be held liable as a state actor under § 1983. The question of whether the deprivation may be fairly attributed to the state is not coterminous with the ultimate question of the liability of the state actor; rather, it is an analytical test to determine whether a private party acted under color of state law. *See Coakley* v. *Jaffe*, 49 F. Supp. 2d 615, 624 (S.D.N.Y. 1999) ("[p]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983, even if the state actor himself is immune from liability.").

This Court finds applicable and persuasive the reasoning of a recent decision in this District, in which Judge Korman held that private parties may be liable for violation of § 1983 where they made false allegations to a city agency that resulted in a deprivation of plaintiff's constitutional rights. *See Friedman* v. *New York City Administration for Children's Services, et al*, 2005 WL 2436219, at *6 (E.D.N.Y. 2005). Judge Korman began with *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), in which the Supreme Court announced a "joint engagement" theory of liability for private party liability under § 1983:

> [A] private party . . . even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willing participant in joint activity with the State or its agents."

Id. at 152 (quoting *United States* v. *Price*, 383 U.S. at 794 (1966)). Under this theory, corruptly conspiring with a state actor can subject a private party to liability. *See Dennis* v. *Sparks*, 449 U.S. 24 (1980) (action against private party who corruptly conspired with a judge).

The formal requirements of a conspiracy, however, are not required to fulfill the joint engagement theory. The Supreme Court in *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 941-42 (1982), held that a corporate creditor and its president acted under color of state law to deprive plaintiff of constitutionally pro-

tected rights where they abused a Virginia statute authorizing prejudgment attachment by obtaining an ex parte order that was later determined unfounded. The criteria arising out of *Lugar* to determine whether a private party may be held liable for its acts in violation of § 1983, are first, "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," and second, "whether, under the facts of [the] case, respondents, who are private parties, may be appropriately characterized as 'state actors.'" *Id.* at 939.

With respect to the first criteria, the Virginia prejudgment attachment statute "required only that Edmonson allege, in an *ex parte* petition, a belief that Lugar was disposing of or might dispose of his property in order to defeat his creditors" for the writ to issue. Thus, Edmonson's unfounded statements caused the Virginia court to issue the writ and the sheriff to attach plaintiff's property. *Id.* at 924. The Court observed that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well." *Id.* at 941.

With respect to the second criterion, the Court repudiated the notion that "joint participation" must be concerted action. The Court stated that the Court of Appeals "erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures . . . Whatever

may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Id.* at 942. This principle was implicitly reestablished by *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999). There, the Court held that a private insurer's withholding of payments in accordance with Pennsylvania's Workers' Compensation Act did not constitute state action. In clarifying the *Lugar* criteria for "joint participation," however, the Court noted that "[i]n the present case, of course, there is no effort by petitioners to seize the property of respondents by an *ex parte* application to a state official."

As noted by Judge Korman in *Friedman*, though "*Lugar* arose in the context of prejudgment attachments of property, there is a stronger basis for extending the holding of a case where a defendant deliberately and wrongfully caused a violation of the plaintiff's constitutional rights." *Friedman*, 2005 WL 2436219 at *7. And indeed, though both *Lugar* and *Friedman* arose in the civil context, stronger still is the argument for applying *Lugar's* reasoning where a criminal arrest and a person's physical liberty are at stake. *See Coakley*, 49 F. Supp. 2d 615 (S.D.N.Y. 1999) (holding private actors liable under § 1983 where they manipulated evidence they presented to a county assistant district attorney leading to the arrest and prosecution of the plaintiffs.). State law permits a crime victim to rely upon a police officer's nearly unassailable right to find probable cause and make an arrest based upon a victim's allegations. In return, the law does not demand accuracy in all of her allegations; it only demands that she not abuse the officer's authority to make the arrest. If a victim

makes false statements to the police, with the intent to have an innocent person arrested in violation of his Fourth Amendment rights, she may not only be held accountable for false imprisonment under state tort law, but under federal law, for invoking the state's power to intentionally violate a citizen's constitutional rights.

Here, defendants claim entitlement to judgment as a matter of law because their roles in his arrest were "civilian" in nature. Because defendants made *ex parte* statements to police that caused plaintiff's arrest, however, the classification of their role as civilian requires a preceding conclusion that they acted in good faith. Because there are genuinely disputed facts over whether defendants intended by their actions to have plaintiff falsely arrested, this Court cannot determine that defendants Goodman, O'Gorman, and Serrano are entitled to judgment as a matter of law on plaintiff's Third Claim, alleging violation of his Fourth Amendment rights.

The Board, however, cannot be liable for the allegedly false arrest or for Fourth Amendment violations against Weintraub. The theory advanced by Weintraub on these claims is that the Board's failure to train Goodman, O'Gorman, Miller and Serrano resulted in Weintraub's false arrest. Whether the individual defendants in this case followed proper procedures or not, the record is undisputed that the Board has enacted policies and provided training to its employees on the subject of proper arrest procedures in the school. Miller testified that he had been trained on such procedures, and Weintraub's own submissions establish that these policies and training procedures exist. Because there is no evidence that the Board acted with deliberate indifference on the sub-

ject of proper arrest procedures, the Board is entitled to summary judgment on Weintraub's Third Claim.

2. The malicious prosecution claim

Though related, the torts of false arrest or imprisonment and malicious prosecution protect individuals from different harms. Whereas the tort of false imprisonment "protects the personal interest of freedom from restraint of movement," the tort of malicious prosecution "protects the personal interest of freedom from unjustifiable litigation." *Broughton* v. *State of New York*, 37 N.Y.2d 451, 456-57, 373 N.Y.S.2d 87, 335 N.E.2d 310 (N.Y. 1975). Thus, the "*sine qua non*" of malicious prosecution is a prior judicial proceeding, generally a warrant for which an arrest issues. *Id.* at 457, 373 N.Y.S.2d 87, 335 N.E.2d 310. The elements of the tort are (1) commencement or continuation of a criminal proceeding, (2) termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice. *Id.* (citing Prosser, Torts, 4th Ed. § 119). A claim for malicious prosecution "may arise only after an arraignment or indictment or some other 'evaluation by a neutral body that the charges [were] warranted.'" *Silver* v. *Kuehbeck*, 2005 WL 2990642 at* 5 (S.D.N.Y. 2005) (citing *Stile* v. *City of New York*, 172 A.D.2d 743, 743, 569 N.Y.S.2d 129 (2d Dept. 1991) (quoting *Broughton*, 37 N.Y.2d at 459, 373 N.Y.S.2d 87, 335 N.E.2d 310)).

Because there was no prior judicial proceeding to Weintraub's arrest and defendants have established that Officer Miller had probable cause to make the arrest, plaintiff's malicious prosecution claim must fail. Summary judgment must be granted for defendants on this claim for malicious prosecution.

C. Fourteenth Amendment claims

In his Fourth Claim, plaintiff alleges that Goodman, O'Gorman, Vazquez, Becker, Cioffi, and the Board deprived him of property and liberty without due process of law. The inquiry to this claim begins with a determination "whether the challenged state action infringed a protected constitutional right which plaintiff had. If the interest [he] asserts is not of a constitutional dimension, i.e., not a protected property or liberty interest, then [his] arguments must fail." *Donato* v. *Plainview-Old Bethpage Cent. School Dist.*, 96 F.3d 623, 628-29 (2d Cir. 1996).

While the Fourteenth Amendment protects property interests, it does not create them. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). It is well-established that under New York law "[t]he employment of a probationary or non-tenured teacher may be terminated at any time during the probationary period, and for any reason, without a hearing." *Von Gizycki* v. *Levy*, 771 N.Y.S.2d 174, 3 A.D.3d 572 (2d Dept. 2004) (citing *N.Y. Educ. L.* § 2509(1)(a)). Thus, there is no basis in New York law to find that Weintraub had a property interest in his probationary teaching position. *Accord*, *Donato*, 96 F.3d at 629. While it is true, as noted in *Donato*, that the Board does not enjoy carte blanche to terminate even a probationary teacher, and indeed, *Von Gizycki* provides for an arbitrary and capricious standard of review on premature terminations of a probationary teacher, "constraints on the Board's discretion do not

create a property interest for plaintiff in [his] probationary position." *Donato*, 96 F.3d at 629-630. *See also, Von Gizycki*, 3 A.D.3d 572, 771 N.Y.S.2d 174. Any constitutional claim based on a deprivation of property in the form of a probationary teaching position must fail.

"A government employee's liberty interest is implicated where the government dismisses him based on charges 'that might seriously damage his standing and associations in his community' or that might impose 'on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities.'" *Brandt* v. *Board of Cooperative Educational Services*, 820 F.2d 41 at 43 (citing *Roth*, 408 U.S. at 573). To succeed on such a "stigma-plus" claim, Weintraub must prove "1) some action by the Board imposing a tangible and material burden, and 2) utterance of a false statement that damaged his reputation in connection with the burdensome action." *O'Connor* v. *Pierson*, 426 F.3d 187, 195 (2d Cir. 2005).

As applied to this case, *Brandt* is particularly instructive. There, a probationary teacher was pressured to resign by the school board under a cloud of allegations involving misconduct with his students. *Brandt* refused to resign, and sought relief pursuant to 42 U.S.C. § 1983 claiming that the allegations were false and that the school board had violated his right to liberty under the Fourteenth Amendment. The Circuit held that the teacher was entitled to a name clearing hearing after raising the issue of falsity regarding stigmatizing charges and statements in his personnel file, and that genuine issues of material fact existed as to whether those charges and

statements would likely be made public. *See Brandt*, 820 F.2d at 41.

Defendants' motion for summary judgment on plaintiff's "stigma-plus" claim must be denied. At various times, Goodman and O'Gorman inserted statements to Weintraub's personnel file alleging incompetent performance, abandonment of his class, corporal punishment, and sexual abuse. The falsity of each of these statements has been established or is alleged by Weintraub. Defendants Vazquez, Becker and Cioffi stated at various times that he was terminated for having been arrested for a serious offense, having had a criminal record, or for unsatisfactory performance as a teacher, and refused to reinstate him despite Weintraub's insistence that each of these statements was false. The falsity of each of these statements has either been established or is in dispute.

Moreover, some of the defendants have failed to comply when ordered to remove or redact inappropriate material from Weintraub's file. For example, O'Gorman's first classroom observation was ordered removed and rewritten; instead, the offensive material was simply struck through with a series of thin lines that did not even render the statements unreadable. It also appears that O'Gorman relied upon unsupported letters still in Weintraub's file, despite their having been found unsubstantiated, in completing the negative year-end performance review which was adopted by Vazquez. These acts cast doubt on whether Weintraub may rely on the future discretion of the defendants should he need to have his personnel files released to a prospective employer. Arguably, Weintraub suffered an actual injury from defendants' failure to clear his name when he was termi-

nated and not reinstated to his position in the Chancellor's District. In any event, however, Weintraub "need not wait until he actually loses some job opportunities because the presence of the charges in his personnel file coupled with a likelihood of harmful disclosure already place him 'between the devil and the deep blue sea.'" *Brandt*, 820 F.2d at 45 (citing *Velger* v. *Cawley*, 525 F.2d 334, 336 (2d Cir. 1975)). He is entitled to remedial action to clear his name and insure that defendants do not unfairly interfere with his professional opportunities.

A name-clearing hearing is generally the appropriate remedy in a "stigma-plus" case. *See Brandt*, 820 F.2d at 43 ("Where an employee's liberty interest is implicated, he is entitled under the due process clause to notice and an opportunity to be heard."). However, the Court will also entertain the possibility that in this case, where more than five years have elapsed during which time plaintiff has been entitled to a name-clearing hearing, a name-clearing hearing may be insufficient and compensatory damages may also be an appropriate remedy. *See Patterson* v. *City of Utica*, 370 F.3d 322, 337-38 (2d Cir. 2004) (holding that where four years had elapsed during which an employee should have been entitled to a name-clearing hearing, a hearing would be an insufficient remedy and compensatory damages may be awarded). *Patterson* established the precedent that where "it is unlikely that a proper name-clearing hearing would, at the present time, reverse any ill effects suffered by plaintiff from the inadequacy of the former hearing," a plaintiff may recover for damages that he can prove "he suffered as a result of the deprivation of his liberty interest [and] would not have occurred if [defendant] had provided [him] with a sufficient name-clearing hearing." *Id.*

CONCLUSION

Many questions of fact exist in this case that cannot be resolved by the Court. Specifically, though not exhaustively, factual determinations are needed with respect to defendants' intent on the First Amendment retaliation claim. On the false arrest and Fourth Amendment claims, factual determinations must be made as to what took place between Serrano and Weintraub, and defendants' intent in having him arrested. On the Fourteenth Amendment claim, facts remain to be established as to whether Weintraub was damaged by not having had an opportunity to clear his name, and the nameclearing hearing itself will require factual determinations.

For the foregoing reasons, summary judgment is DENIED for all defendants on plaintiff's First Cause of Action for First Amendment retaliation. Plaintiff's Second Cause of Action, inchoately alleging a violation of § 1983 arising from defendants' report of sexual abuse is DISMISSED for failure to state a claim. Summary judgment is GRANTED for Frank Miller and the Board of Education on plaintiff's Third and Fifth Causes of Action, alleging Fourth Amendment violations and state law claims of false arrest, and for all defendants on the state law malicious prosecution claim. Summary judgment is DENIED in all other respects on plaintiff's Third, Fourth, and Fifth Causes of Action alleging Fourth and Fourteenth Amendment violations under 42 U.S.C. § 1983 and false imprisonment under state law.

SO ORDERED.

APPENDIX D

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.V
MAY 22, 2009
BROOKLYN OFFICE

Richard A. Engelberg, Esq.
E-Mail: Rengelberg1@Verizon.Net
54 Sunnyside Blvd. – Suite 3
Plainview, New York 11803

May 14, 2009

Senior Judge I. Leo Glasser
United States District Court
Eastern District of New York
225 Cadman Plaza East

Attn: Chambers Rm 921 South

Re: Weintraub v. Board of Education of the City of New York et al.
Docket No.: CV-00 4384 (ILG)

Honorable Sir:

Permit this letter to act as a motion pursuant to Rule 25 (a) of the Federal Rules of Civil Procedure to substitute Gary Weintraub administrator of the Estate of David Weintraub in place of the plaintiff. David Weintraub passed away on February 14, 2009 as per a copy of the death certificated annexed.

The Surrogate's Court of Queens County appointed Gary Weintraub as administrator of David Weintraub's Estate on May 1, 2009. Annexed to this letter is a Certificate of Appointment of Administrator.

Granted

So Ordered

_____

N.S.D. J
5/21/09

APPENDIX E

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 12th day of April, two thousand and ten.

David H. WEINTRAUB,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Community School District 32, City of New York, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano, Lawrence Becker, Jerry Cioffi,

Respondents-Appellees.

No. 07-2376-cv

David Weintraub having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

(2)

170

No. 10-202

Supreme Court, U.S.
FILED
SEP 13 2010
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212)788-0835 or 1010

LEONARD J. KOERNER,*
EDWARD F.X. HART,
of Counsel.

*Counsel of Record

September 13, 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

COUNTER-QUESTIONS PRESENTED 1

COUNTER-STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

1. The Case At Bar Falls Within The Parameters of *Pickering*, *Connick*, and *Garcetti*. 8

2. Federal Appellate Decisions Subsequent To *Garcetti* All Support The Court's Reasoning In *Weintraub*. 15

3. The Use Of "Related To" and "Required By" In The Decisions Since *Garcetti* Demonstrate A Uniformity Of Outcomes 20

4. The Circuit Courts Have Not Decided Any Substantial Legal Issue Differently When Determining An Issue As A Mixed Question Of Law And Fact Or As A Question Of Law. 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases *Page*

Alaska v. EEOC,
564 F.3d 1062 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1054 (2010) 23

Casey v. West Las Vegas Independent School District,
473 F.3d 1323 (10th Cir. 2007) 17, 18

Cioffi v. Averill Park Central School District,
444 F.3d 158 (2d Cir. 2006), *cert. denied*,
549 U.S. 953 (2006) 16, 17, 26

Connick v. Myers,
461 U.S. 138 (1983) ..... passim

Davenport v. University of Arkansas Board of Trustees,
553 F.3d 1110 (8th Cir. 2009) 22

Davis v. Cook County,
534 F.3d 650 (7th Cir. 2008) 27

Freitag v. Ayers,
468 F.3d 528 (9th Cir. 2006), *cert. denied*,
549 U.S. 1323 (2007) 20, 21, 23, 25, 26

Garcetti v. Ceballos,
547 U.S. 410 (2006) ..... passim

Green v. Board of County Commissioners,
472 F.3d 794 (10th Cir. 2007) 19

Hughes Tool Co. v. Trans World Airlines, Inc.,
409 U.S. 363 (1973) 5

Judge O'Scannlain of the Court of Appeals for the Ninth Circuit (concurring),
361 F.3d 1168 (2004) 25

Lindsey v. City of Orrick,
491 F.3d 892 (8th Cir. 2007) 23

Mills v. City of Evansville,
452 F.3d 646 (7th Cir. 2006) 19

Pickering v. Board of Education,
391 U.S. 563 (1968) 10, 11

Rankin v. McPherson,
483 U.S. 378 (1987) 16

Roe v. City of San Diego,
543 U.S. 77 (2005) 16

Spiegla v. Hull,
481 F.2d 961 (7th Cir. 2007), *cert. denied*,
552 U.S. 975 (2007) 19, 20

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 6

Weintraub v. Board of Education of the City of New York,
593 F.3d 196 (2010) 4, 15

STATUTES

28 U.S.C. 1292(b) 2

42 U.S.C. § 1983 ..... 2, 4

OTHER AUTHORITIES

Baker, *A Practical Guide to Certiorari*, 33
Cath. U. L.U. Rev. 611, 617 (1984) 9

Chemerinsky, *The Kennedy Court: October Term 2005, 9 Green Bag 2d 335, 340 (2006)* 18

Schauer, *The Supreme Court, 2005 Term - Forward: The Court's Agenda - and the Nation's*, 120 Harv. La. Rev. 4, 35 17

COUNTER-QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in an interlocutory appeal where the issue before this Court would still need to be adjudicated in the District Court once this Court decides this appeal.

2. Whether the instant case was correctly decided under the precedents of this Court, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Connick v. Myers*, 461 U.S. 138 (1983), which do not provide First Amendment protection for speech "relating to" employee duties rather than only for speech "required" by an employee's duties.

3. Whether a split among the circuits is tolerable and, therefore, does not require this Court's intervention where the issue is whether a judge or a jury should determine if employee speech is afforded First Amendment protection, where the cases cited by petitioner do not demonstrate a difference in outcome.

COUNTER-STATEMENT OF THE CASE

(1)

In this civil action brought pursuant to 42 U.S.C. § 1983 for unconstitutional retaliation against petitioner, a former employee of the Board

of Education of the City of New York[1], he petitions for a writ of certiorari from an order and judgment of the United States Court of Appeals for the Second Circuit. The appeal from the United States District Court for the Eastern District of New York was an interlocutory appeal pursuant to 28 U.S.C. 1292(b). On appeal, petitioner raised as his sole contention whether a public employee acts as a "citizen" and not an "employee", when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon an issue of public concern, as well as the employee's private interests. Although petitioner had raised three separate incidents, which he claimed constituted retaliation by his superiors, *i.e.*, his discussion with the assistant principal concerning the lack of action taken with reference to the student; his statements made at lunch to his faculty colleagues regarding the same issue; and his grieving the same issue through the process established by the school system to raise job-related issues, only the first and the third were appealed. Initially, the District Court determined that petitioner's conversation with his colleagues constituted speech made as a citizen and was protected by the First Amendment. That issue remains to be determined by the District Court after submissions and a trial. The District Court

---

[1] The Board of Education is now known as the Department of Education.

and the Court of Appeals granted petitioner's motions for an interlocutory appeal.

(2)

Petitioner was a probationary teacher assigned to the fifth grade. He commenced work there as a teacher in the New York School System on September 1, 1998. There were no apparent problems in his class until November 6, 1998, when petitioner sent a student to an assistant principal because petitioner alleged the fifth grader threw a book at him. Petitioner alleged that the same student threw a book at him the next day of class. Although a regulation of the Board of Education requires a teacher to report any seriously disruptive student behavior to a supervisor in writing, there is nothing in this record evidencing any written notice by petitioner concerning the student's behavior. Petitioner presumed the assistant principal spoke to the child, but the child was not suspended as petitioner believed he should have been.

Petitioner alleges that, as a result of his filing of grievances and expressing the intention to file grievances, he was treated differently after the early November incidents than before and was retaliated against by the assistant principal and other respondents. Petitioner was ultimately terminated on October 1, 1999.

Petitioner subsequently commenced an Article 78 proceeding (a challenge to an administrative determination) in New York State Supreme Court, alleging that his termination was in bad faith and in retaliation for his pursuing a claim for false imprisonment. The New York State Supreme Court found that there was no evidence of retaliation or bad faith. In 2000, petitioner commenced the instant action pursuant to 42 U.S.C. §1983 in United States District Court for the Eastern District of New York. Petitioner did not request a jury to determine any issues, although he asserts that they should be treated as a mixed question of fact and law.

SUMMARY OF ARGUMENT

In deciding whether the speech of a government employee is protected by the First Amendment Speech Clause, the Court of Appeals first determined whether the employee was speaking as a citizen or as a government employee before determining whether the speech touched upon an issue of public concern or safety. The Circuit Court held that petitioner's speech was made pursuant to or in accord with his employment duties and, therefore, acted within the scope of his employment. *Weintraub v. Board of Education of the City of New York*, 593 F.3d 196, 202 (2010). Consequently, the inquiry terminated and the Court held the speech to be without First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

We submit that, in the instant case, petitioner's speech falls squarely within the parameters set by this Court in *Garcetti v. Ceballos* and *Connick v. Myers* and was engaged in expression pursuant to his duties as a teacher when he complained about and grieved the assistant principal's alleged failure to discipline a student in petitioner's charge. Because petitioner's claim of retaliation for exercising his protected speech rights cannot be sustained under this Court's precedents, the Court of Appeals properly affirmed the grant of summary judgment on the two issues on appeal.

The instant appeal, moreover, is non-final. While this Court grants certiorari in a limited number of interlocutory cases, they involve important issues or cases where the decision below is patently wrong. Neither is the case here. Rather, as demonstrated below, the splits among the circuit courts are reconcilable and the case at bar was correctly decided. This case is not a vehicle for determining any of the issues petitioner raises because under any theory raised his cause would be dismissed. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). See also *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366, n. 1 (1973).

The two issues which petitioner raises concerning splits in the circuit courts of appeal, while real, are better left to another case, because the decision in the instant case is clearly correct

and in keeping with this Court's instruction in *Connick* and *Garcetti*. The instant facts, moreover, do not lend themselves to a clarification that petitioner seeks because they are demonstrably well within the parameters set by this Court's jurisprudence concerning the applicability of First Amendment protection for governmental employee speech.

The split between the Eighth and Ninth Circuits on the one hand and virtually all the other Circuits on the other hand regarding whether an employee's speech is "related to" his official duties or is "required" by his official duties on the other hand is not an issue that arises in the case at bar. Under that approach, the facts herein require a determination of constitutionally unprotected speech whether the test is "pursuant to" or required by". The Second Circuit carefully followed the *Garcetti* language in reaching its decision in the instant case. This Court does not demand a strict adherence to what the job requirements are, but rather a "practical" approach to the question. *Garcetti v. Ceballos*, 547 U.S. at 424.

The split between the Third, Seventh, and Ninth Circuits on the one hand and the Fifth, Tenth, and D.C. Circuits on the other hand regarding the issue of whether the words "pursuant to" is a question of law or a mixed question of law and fact does not merit review by this Court now because the cases, which the circuits on both sides of the alleged split have decided, have not deviated

significantly one from the other. To this point, the split is more hypothetical than real. The District Courts and the Courts of Appeals can correct anomalies which arise from jury decisions that fail to follow instruction. The results, therefore, should ultimately be consistent as they have in fact been. This Court, moreover, in *Connick v. Myers*, 461 U.S. 138 (1983), resolved the issue at 148, footnote 7, where this Court determined that the issue is one solely of law.

ARGUMENT

PETITIONER'S STATEMENTS TO THE ASSISTANT PRINCIPAL AND THE GRIEVANCE FILED BY HIS UNION ON HIS BEHALF ARE NOT PROTECTED SPEECH BY A GOVERNMENT EMPLOYEE UNDER THE FIRST AMENDMENT BECAUSE, AS INSTRUCTED BY THIS COURT IN *GARCETTI V. CEBALLOS*, STATEMENTS WERE MADE NOT AS A CITIZEN ON ISSUES OF PUBLIC CONCERN, BUT RATHER PURSUANT TO HIS DUTIES AS A TEACHER AND ON A PERSONAL ISSUE. CONSEQUENTLY THE *PICKERING* BALANCING TEST DOES NOT APPLY. THE TWO ISSUES FOR WHICH

PETITIONER URGES THE COURT TO GRANT CERTIORARI ARE NOT SUBSTANTIAL ENOUGH TO MERIT REVIEW BY THIS COURT AT THIS TIME AND IN THIS CASE.

1. The Case At Bar Falls Within The Parameters of *Pickering*, *Connick*, and *Garcetti*.

This Court does not usually grant certiorari in an interlocutory appeal absent other factors, which the Court has deemed "intolerable" See S. Baker, *A Practical Guide to Certiorari.*, 33 Cath. U. L.U. Rev. 611, 617 (1984). Summary judgment would have been granted to defendants under any theory of the case. This case, moreover, does not lend itself as a proper vehicle for what is arguably an important question of constitutional law. It would have been decided this way no matter what position the Second Circuit espoused on the two issues which petitioner raises in his brief. We submit that this Court has held that to state a First Amendment retaliation claim under § 1983, a public employee must allege: (1) that the speech at issue was protected; (2) that he or she suffered an adverse employment action constituting conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) a causal connection

between the protected speech and the adverse action. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983).

In the instant case, petitioner has failed to allege any facts which would support a First Amendment retaliation claim because the speech for which he claims retaliation was made as part of and in the course of his official duties as a teacher in the City public school system. Consequently, as the Court of Appeals correctly held, pursuant to *Garcetti* and *Connick*, those expressions do not constitute protected speech. Because the speech at issue, moreover, did not address any matter of public concern nor was it intended to, the statement was not constitutionally protected under the circumstances here. It was proper, therefore, not to reach the *Pickering* balance test because petitioner was engaged in speech at the core of his job duties as a teacher and concerning his personal disagreements over the application of discipline to one student in his class by the assistant principal.

Pickering v. Board of Education, 391 U.S. 563 (1968), has served and continues to serve as the bright line test in determining whether the First Amendment protects the speech of a government employee. This Court imposed a two pronged test, balancing the public employee's interest as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting efficiency of the

public services it performs through its employees. While declining to lay down a general standard against which all such statements may be judged, the Court, in holding that the teacher had a constitutionally protected right to comment in a letter to the editor on a recently proposed school budget, noted that the "statements are in no way directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work as a teacher." *Id.* at 570. The Court further noted that the teacher's "employment relationships with the board and, to a somewhat lesser extent, with the superintendent, are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. · In sum, this Court concluded that, where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher,... it is necessary to regard the teacher as a member of the general public he seeks to be." *Id.* at 573. This is clearly not the situation in the instant case, where the assistant principal is petitioner's direct supervisor and works in close and daily contact with him.

In *Connick v. Myers*, 461 U.S. 138, 147 (1983), this Court held that, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interests, absent the most unusual circumstances, a federal court is not the

appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." The Court held that the questionnaire concerning personnel matters, were it released to the public, would convey no information to the public regarding the functioning of a public office, but rather reflect a single employee's dissatisfaction with the status quo. *Id.* at 148. The Court noted that, "[to] presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Id.* at 149. In sum, the Court opined that it would be a Pyrrhic victory for the great principles of free expression "if the safeguarding of a public employee's right, as a citizen to participate in discussions concerning public affairs, were confused with the attempt to constitutionalize the employee grievance". *Id.* at 154.

Applying *Pickering* and *Connick* to the facts at bar, and without the need of applying the *Pickering* balancing test, it is obvious that the instant issue is one of purely personal interest to plaintiff and of no public interest whatsoever. It seeks to constitutionalize an intra-office dispute between an employee and his immediate supervisor with whom he interacts on a close and daily basis over the proper disciplining of a single student. Under both *Pickering* and *Connick* there is no requirement that a balance between the employer

and the employee rights be struck where, as here, plaintiff is not speaking on an issue of public concern but on a strictly private matter.

In *Garcetti v. Ceballos*, this Court held that, when "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court reasoned that "government employers, like private employers, need a significant degree of control over their employees' words and actions" to operate efficiently and provide necessary services. *Garcetti* at 421. Mr. Ceballos took a position clearly contrary to his employer. As a result of his actions, his superiors took negative employment actions against him. He sued for retaliation for his expression of protected speech on an issue of admittedly great public concern – the propriety of a search warrant affecting important Fourth Amendment Constitutional rights. *Id.* at 414-415.

However, the Court held that Ceballos's speech, important though it was, was not protected by the First Amendment Speech Clause. The Court observed at 422:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way, he did not speak as a

> citizen by writing a memo that addressed the proper disposition of a criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.

In the instant case, there is no question that petitioner's statements were made pursuant to his duties as a public school teacher. His threat to the assistant principal to file a grievance and the grievance he ultimately filed were based solely upon his private disagreement with the fact that the student he reported for allegedly throwing a book at him was not suspended by the assistant principal. This speech falls squarely within the parameters of employee speech which *Garcetti* held is not protected by the First Amendment Speech Clause. Consequently, the Court of Appeals properly rejected petitioner's claim that his words were spoken in his capacity of a private citizen speaking on a matter of public concern, as opposed to pursuant to his official job duties.

A strong analogy must be drawn between the facts in *Garcetti* and the instant facts. In *Garcetti*, the plaintiff complained in a memo to his superiors concerning a police officer's preparation of an affidavit in a motion to obtain a search warrant and testified in a hearing to the same effect. Here, plaintiff complained to his superior about the superior's handling of a disciplinary matter and then filed a grievance regarding the same matter.

Both the prosecutor's speech in *Garcetti* and the teacher's speech in the instant case were made pursuant to and in furtherance of their official duties and, therefore, do not constitute protected speech.

The threshold question is whether the speech at issue can "be fairly characterized as constituting speech on a matter of public concern" rather than speech addressing matters of personal interest. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Whether an employee's speech addresses a matter of public concern must be determined by the "content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48. To constitute speech on a matter of "public concern," an employee's speech must satisfy two criteria. It must relate to a matter of political, societal, or other community concerns. And, significantly, the employee must speak "as a citizen upon matters of public concern," not simply "as an employee upon matters only of personal interest." *Id.* at 147. Both the context of the speech, as well as the content, are significant.

In the case at bar, the Court of Appeals ruled that petitioner's statements to the assistant principal that he would file a grievance and his actual filing of the grievance were made in pursuance of his duties of teacher. *Weintraub v. Board of Education of the City of New York*, 593 F.3d, *supra* at 203. Neither addressed nor were they intended to address a matter of public concern.

"Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication made pursuant to an existing dispute-resolution policy established by his employer, the Board of Education". *Weintraub v. Board of Education*, 593 F. 3d, *supra*, at 204. The Court concluded that petitioner's internal grievance filing lacked a relevant analogue to citizen speech and retained no possibility of constitutional protection. Speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in *Connick*. Speech that touches upon an issue of social importance does not comprise speech on a matter of public concern if the speech is motivated solely by a desire to advance the speaker's personal interests. *Connick* itself made the point that not all speech on matters of public significance is "public concern" speech.

As this Court in *Roe v. City of San Diego*, 543 U.S. 77, 82 (2005) stated, "[t]o require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices." No public concern purpose can be attributed to plaintiff's statement here, as it did nothing to inform the public about any aspect of the functioning or operation of the educational system. Nor was plaintiff commenting privately to another coworker on an item of political news, as in *Rankin v. McPherson*, 483 U.S. 378 (1987).

2. Federal Appellate Dec[illegible]ns Subsequent To *Garcetti* All Support The Sec[illegible]d Circuit Reasoning In *Weintraub*.

Since the Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), several Circuit and District Court cases have applied its holding to a variety of fact patterns. In *Cioffi v. Averill Park Central School District*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), decided a month prior to the *Garcetti* decision, the Second Circuit, based upon the record and petition in *Garcetti*, distinguished *Cioffi* from *Garcetti*, stating in footnote 3 at 166 that, unlike *Garcetti*, "the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen ... about circumstances that led to criminal activity in the public school system and the manner in which public school officials were responding to that conduct." The Court noted that both in Cioffi's letter and press conference, he emphasized that his primary concern was the health and safety of the students involved. *Id.* at 166.

In *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007), the Court reviewed a First Amendment speech retaliation claim brought by the director of a Head Start Program, alleging that her expressions of criticisms and accusations regarding her employer were protected by the First Amendment and were,

BEST AVAILABLE COPY

therefore, actionable. The Court held that, in light of the Supreme Court's holding in *Garcetti*, only one of her three claims survived the *Garcetti* test, the one in which her action exceeded her duties as director of the Head Start Program. *Id.* at 1328-1329. More significantly for the case at bar, the Court held that the question on *Pickering's* first prong is modified and the Court is obliged to ask "whether Mrs. Casey met her burden by providing evidence that her expressions were made in her capacity as a citizen and not pursuant to her 'official duties'." *Id.* at 1328. *See also* footnote 4 at 1328 quoting Schauer, *The Supreme Court, 2005 Term – Forward: The Court's Agenda – and the Nation's*, 120 Harv. La. Rev. 4, 35, noting that *Garcetti* "established a new rule governing a vast amount of lower court litigation"; and Chemerinsky, *The Kennedy Court: October Term 2005, 9 Green Bag 2d 335, 340 (2006)* ("the most significant [First Amendment decision] was likely *Garcetti*").

The Court also held that the communications made with reference to the Board of the Head Start program, of which she was the director, and the communications to the Board with reference to its failure to comply with the Open Meetings law were within the scope of her official duties and were, therefore, not protected speech under *Garcetti*. *Casey* at 1330-1333. The Court held that it was clear that the facts established "that Mrs. Casey was acting ' pursuant to' her official duties. *Black's* defines the relevant term as meaning [i]n

compliance with; in accordance with.' *Black's Law Dictionary* 1272 (8th ed. 2004)." The Court determined that, "[b]uttressing the conclusion that Mrs. Casey acted in accordance with, if not compelled by, her office, she also stated that ... she aimed at 'fixing the problem before it got worse'." *Id.* at 1330. The only speech the Court held to be protected by the First Amendment was Casey's communications with the New Mexico Attorney General's Office, which was clearly beyond the scope of her employment duties as Director of the Head Start Program and her obligations with reference to its Board. *Id.* at 1332. *See also Green v. Board of County Commissioners*, 472 F.3d 794, 801-802 (10th Cir. 2007) (Court held drug lab employee's speech not protected when she ignored her supervisors and scheduled confirmatory drug test, suspecting prior test had been a false positive, because her actions were generally "the type of activities she was paid to do."

In *Mills v. City of Evansville*, 452 F. 3d 646 (7th Cir. 2006), a police sergeant criticized a proposal to reorganize her department. Her remarks occurred during a gathering of senior police officers, subsequent to an official meeting to discuss the plans. *Id.* at 647-648. The Court held that her remarks were made in her capacity of a public employee and not as a citizen. *Id.* at 648.

In *Spiegla v. Hull*, 481 F.2d 961 (7th Cir. 2007), *cert. denied*, 552 U.S. 975 (2007), after holding that a prison guard's speech in reporting

possible lapses in prison security was protected under the First Amendment's Speech Clause, reversed itself after remand in light of *Garcetti* and held that the prison guard's speech was not protected because she was not speaking as a citizen, but rather in the course of her employment as a correctional officer. The Court held that after *Garcetti*, the *Pickering* balancing inquiry is not made if it is first determined that the employee was not speaking as a citizen, but as an employee. *Id.* at 965. Spiegla had attempted to search a state vehicle because of suspicions that she had that it may have been carrying contraband, but was prevented from doing so by a superior. When she reported this to another supervisor and he reported it to the other officials, she was transferred to a different post and sued for retaliation.

Here the Court held that, "based on the records as a whole, we conclude that Spiegla was speaking pursuant to her official duties – not as a citizen – when she told [her supervisor] about the conduct of [other guards]." *Id.* at 965-66. "She did not make a public statement, discuss politics with her co-worker, write a letter to newspapers or legislators, or otherwise speak as a citizen." *Id.* at 967.

Finally, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007), a prison guard was the target of inappropriate, sexually explicit inmate behavior. When she submitted disciplinary forms documenting the

behavior, prison officials ignored them or acted too slowly for inmates to be disciplined. She wrote numerous memoranda and letters complaining of her supervisors' undermining her authority and allowing a hostile work environment to exist and continue. *Id.* at 533-534. Later, she filed a discrimination charge and wrote two letters to her state senator; the senator contacted the California Office of the Inspector General, which investigated and substantiated her charges. *Id.* at 535. Her employment was subsequently terminated and she brought suit, claiming retaliation for her complaints to her superiors, to her state senator and the Investigator General. The Court held she was acting as a citizen in her communications with the IG and her state senator, but that under *Garcetti* her internal communications (except one, which was remanded to the district court for further consideration) were not protected because they were submitted pursuant to her duties as a correctional officer. *Id.* at 545-546.

In sum, the holding in the instant case is in accord with the holdings in all the cases, where the issue is whether or not the plaintiffs were speaking as citizens on issues of public concern. The analysis used by each Circuit Court reached the same conclusions based upon the stated facts, despite the procedures utilized or the phrases employed in describing the parameters of an employee's scope of employment.

3. The Use Of "Related To" and "Required By" In The Decisions Since *Garcetti* Demonstrate A Uniformity Of Outcomes.

As with petitioner's characterization of a "deeply divided" split between the circuits on the question of the what procedure to use in determining factual issues (*infra* at 26), so is his characterization of the split between the Eighth and the Ninth on the one hand and the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and the D.C. Circuits on the other as it relates to the scope of an employee's job duties as "irreconcilably divided" and "[i]n stark contrast". He argues that the phrase "related to" [the eight circuits) and the phrase "required by" [the Eighth and the Ninth] to describe what an employee's job tasks are when he or she acts "pursuant to" them, will determine whether an employee's speech is protected by the First Amendment speech clause. He implies that the application of the phrase "related to" will result in less protection for employee speech than the phrase "required by". We submit that the two positions, as applied, are not irreconcilable in a material way, as is demonstrated by the cases petitioner cites.

In *Davenport v. University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), a state university employee complained on one occasion of an issue of resources and on another three years later of illegal expenditure of public funds. In its analysis of constitutionally protected

speech, the Court utilized the "pursuant to" language rather than "required by" and concluded that his speech was protected when he complained of misuse of public funds because it constituted an issue of public concern and which was not "pursuant to" his job duties. He had, however, a duty to cooperate with the Arkansas State Police investigation of misappropriation of funds and his speech was, therefore, not protected. This outcome would be no different under the "related to" rubric.

In *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007), the facts dictate a similar outcome in both judicial camps. The plaintiff, a City employee working for the City Council, complained that the City Council was not complying with the law regarding the manner it conducted its public meetings. He aired his complaints at a public meeting of the council. The Court held that he was speaking as a citizen on an issue of public concern and that, therefore, his speech was protected by the Speech Clause of the First Amendment. Again, this would be the outcome in any of the eight Circuits applying the "related to" test.

In *Alaska v. EEOC*, 564 F 3d 1062 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1054 (2010), an employee in the governor's office, held a press conference to support a fellow employee's allegations of sexual harassment in the governor's office. The speech was held to be constitutionally protected. Without a doubt, the result here would have been the same under either test because in

virtually any case speech in an open forum about issues of public concern such as misuse of funds or sexual harassment in a government office are afforded First Amendment protection.

In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), discussed above at 20, a female correction officer complained to her supervisors regarding sexual harassment. When she received no satisfactory response, she sent several letters to a state senator outlining the harassment of herself and other female officers. Ultimately she was referred to the Investigator General. The Ninth Circuit deemed her communications to the state senator and the Investigator General to be constitutionally protected. The Court arrived at this decision without use of the "required" language and would have reached the same result under either test because speech proffered outside the scope of the requirements of an employee's job duties is always constitutionally protected. All the cases cited in petitioner's brief support the proposition that, despite different ways of expressing scope of a governmental employee's job duties, the outcomes prove to be the same under either test.

There is, moreover, another factor which this Court has interjected into this discussion that is critical. The Court, in its rejection of Justice Souter's in his dissent in *Garsetti* "suggestion that an employer can restrict employees' rights by creating excessively broad job descriptions," takes a

practical approach to the parameters of job titles. *Garcetti v. Ceballos*, 547 U.S., *supra*, at 424-425. (2006). The Court responded by indicating that "[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424-425.

The *Garcetti* Court has made it clear that tests regarding job descriptions are ineffective in determining what tasks an employee actually performs or is required to do. Rather, the test involves a much more practical determination of what is normally incorporated in a job title. Petitioner has argued that to allow the present situation to exist would result in inconsistent outcomes in a variety of cases. He has, however, failed to present one case where the outcome has or would result in a different decision depending upon the procedural framework employed or the legal formulas applied.

In sum, this Court in *Garcetti*, *supra*, at 416, adopted the concurrence of Judge O'Scannlain of the Court of Appeals for the Ninth Circuit (361 F.3d 1168, 1187 (2004), where he emphasized the distinction "between speech offered by a public employee acting as an employee carrying out his or

her ordinary job duties and that spoken by an employee *as a citizen* expressing his or her personal views on disputed matters of public import".

4. The Circuit Courts Have Not Decided Any Substantial Legal Issue Differently When Determining An Issue As A Mixed Question Of Law And Fact Or As A Question Of Law.

Petitioner argues that a split among the circuit courts cannot be tolerated on the issue of whether the speech of a government employee spoken "pursuant to" his official duties is a matter of law or a mixed matter of law and fact. We submit that in all of the cases cited by petitioner in which the Courts of Appeals applied one or the other procedure, in the final analysis, little or no difference exists between the circuits using a jury in what they determine to be questions fact and those circuits deciding them as matters of law.

In *Cioffi v. Averill Park Central School District*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), the Second Circuit held that the plaintiff's speech was protected because he was speaking as a citizen on issues of public concern at a press conference. We submit that allowing a jury to determine factual issues or restricting them to a District Court judge would not in a substantial majority of cases change the outcome. The result was similar in *Frietag v. Ayers, supra*, 468 F.3d 528 (9th Cir. 2006), where a jury determined fact

questions and the Court held that plaintiff engaged in protected speech when communicating with a state senator and the Inspector General, because that communication was clearly beyond the scope of her employment.

The case at bar does not lend itself to review by this Court. The undisputed facts and the Second Circuit's application of this Court's teachings in *Pickering*, *Connick* and *Garcetti* to those facts make the instant case unworthy of a grant of certiorari. As we demonstrated above, petitioner's speech was spoken pursuant to his official duties as an educator and, therefore, was unprotected by the First Amendment. We respectfully suggest that, if this Court wishes to grant a Writ of Certiorari to clarify the issues raised by petitioner, it may be more judicially efficient to grant a writ in a case from the Ninth Circuit, which is the only circuit where both anomalies exist.

Petitioner argues that the Seventh Circuit should be counted with the Third and the Ninth as one of the three circuit courts who support the view that the issue whether the inquiry into the protected status of speech is a matter of law or a matter of law and fact. Petitioner cites *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008), for the proposition that the Seventh Circuit tacitly endorses the mixed question of fact school because of *dicta* referring to the lack of fact issues in the case and summary judgment being properly granted. Much more telling, however, is the

Court's citation to footnote 7 in *Connick v. Myers*, 461 U.S. at 148, which states that "the inquiry into the protected speech is one of law, not fact." This quote, stating in clear and direct language this Court's position on the issue, indicates where the Seventh Circuit stands far more than the *dicta* in the Davis decision, which petitioner claims implies that the Court is in the mixed question camp.

In sum, although there is a procedural distinction between the Eighth and Ninth Circuits, which uses a jury to determine factual issues and all of the eight circuits, which have determined those issues as a matter of law, we submit that it is a distinction without difference.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
September 13, 2010

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Defendants-
Appellees,
100 Church Street,
New York, New York 10007
(212) 788-0835 or 1010

LEONARD KOERNER,
EDWARD F.X. HART,
Of Counsel.

Supreme Court, U.S.
FILED
SEP 29 2010
OFFICE OF THE CLERK

No. 10-202

In the Supreme Court of the United States

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. The Opposition Brief Fails To Address The Primary Points Made In The Petition 1

A. The Public Concern Inquiry Has No Bearing On This Petition. 1

B. The Reasons Why The Decision Below Is Wrongly Decided Stand Unrebutted 2

II. The Petition Presents Important Legal Questions Appropriate For Interlocutory Review. 3

III. The City Concedes That This Case Presents "Real" Splits On Important Constitutional Questions. 5

A. The "Related To" And "Required By" Standards Are Irreconcilable. 5

B. The Standard of Review Materially Impacts The Outcomes Of Cases. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska v. *EEOC*,
564 F.3d 1062 (9th Cir. 2009) 7

Central Bank of Denver v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994) 4

Connick v. *Myers*,
461 U.S. 138 (1983) 10

Davenport v. *University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009) 6

Davis v. *Cook County*,
534 F.3d 650 (7th Cir. 2008) 10

Freitag v. *Ayers*,
468 F.3d 528 (9th Cir. 2006) 7, 9

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) ..... *passim*

Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) 3

Lindsey v. *City of Orrick*,
491 F.3d 892 (8th Cir. 2007) 6

Posey v. *Lake Pend Oreille Sch. Dist. No. 84*,
546 F.3d 1121 (9th Cir. 2008) 8, 10

Reilly v. *City of Atlantic City*,
532 F.3d 216 (3d Cir. 2008) 8

Rohrbough v. *Univ. of Colo. Hosp. Auth.*,
596 F.3d 741 (10th Cir. 2010) 5

Santa Fe Indus., Inc. v. *Green*,
430 U.S. 462 (1977) 4

Solorio v. *United States*,
483 U.S. 435 (1987) 4

TABLE OF AUTHORITIES—continued

Page(s)

Williams v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) 5

Winder v. *Erste*, 566 F.3d 209 (D.C. Cir. 2009) 7

Other Authorities

Eugene Gressman, et al., Supreme Court Practice § 4.18 (9th ed. 2007) 4

REPLY BRIEF FOR PETITIONER

The City concedes that this case presents two "real" circuit splits on "an important question of constitutional law." Opp. 5, 8. Thus, rather than responding to the petition on the merits, the City proffers several unpersuasive arguments that the petition is not an ideal vehicle for resolving these splits. Opp. 26. We respectfully submit that these arguments should be rejected.

First, the City's argument that Mr. Weintraub did not speak on a matter of public concern is both irrelevant to this petition and contradicted by the express findings of the district court. Second, the interlocutory posture is not an impediment to certiorari because the decision below decided an important issue, otherwise worthy of review, and resolution of that issue by the Court may serve to hasten or finally resolve the litigation. Third, the recognized circuit splits have material consequences in this case as well as many of the cases that will be decided until these splits are resolved. Accordingly, certiorari should be granted because this case presents an excellent vehicle to resolve two open questions left open by *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006), that are deeply dividing the courts of appeals.

I. The Opposition Brief Fails To Address The Primary Points Made In The Petition.

A. The Public Concern Inquiry Has No Bearing On This Petition.

Rather than addressing the "pursuant to" standard established in *Garcetti*, the City argues at length about whether the speech addressed a matter

of public concern. Opp. 9-15. That discussion is simply irrelevant to the instant petition.

The district court conclusively found that "[t]here is no doubt that the content of Weintraub's statement * * * relates to a matter of public concern, namely discipline in the public schools." See Pet. App. 71a. Indeed, the district court held that "the specific issue of student violence against teachers presents an issue of public concern in its own right." Pet. App. 72a. The Second Circuit acknowledged this holding (see Pet. App. 4a-5a) before expressly deciding not to reach the issue (see Pet. App. 9a ("[T]here is no cause for us to address whether [Mr. Weintraub's speech] related to a 'matter of public concern.'")). Accordingly, this issue is not before the Court in this petition.

B. The Reasons Why The Decision Below Is Wrongly Decided Stand Unrebutted.

Because the City elects to focus on the public concern element of the *Pickering* test, the City's brief offers only conclusory statements in response to our argument that the Second Circuit's construction of the "pursuant to" standard is unworkable and inconsistent with this Court's precedents.

The petition discussed four reasons raised by Judge Calabresi why the majority's decision was wrongly decided, and the City fails to respond. First, the petition established that the majority's method of piling inference upon inference was unworkable because it would transform nearly all workplace expression into speech "pursuant to" official duties. Pet. 23. The City offers no response. Second, the petition demonstrated that the majority's reliance on the absence of a public analog for the speech was in-

consistent with *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). Pet. 24. The City fails even to mention *Givham*, let alone grapple with the inconsistency. Third, the petition noted that the majority's decision would effectively force speech into public forums, thereby undermining the ultimate goal of *Garcetti* to promote efficient governance. Pet. 24-25. Again, the City offers no response. Finally, the petition argued that the majority improperly affirmed the district court's treatment of the "pursuant to" standard as a question of law, rather than a mixed question of law and fact reserved for a jury. Pet. 26-27. The City fails to engage this argument on the merits.

For all of the unrebutted reasons discussed in the petition and Judge Calabresi's dissent, review is warranted to establish the correct interpretation of this Court's *Garcetti* decision.

II. The Petition Presents Important Legal Questions Appropriate For Interlocutory Review.

The City is wrong to suggest that interlocutory review is unwarranted because this case does not involve "important issues" or a "patently wrong" decision. Opp. 5. It involves both.

First, the City itself concedes that this case involves an "important question of constitutional law." Opp. 8. As the petition highlights, the sheer volume of cases litigated in the lower courts and the chilling effect of the majority's decision over any public employee who challenges misguided or malfeasant conduct by co-workers warrant review. Pet. 27-29. See also Brief of the National Education Association as *amicus curiae* (discussing the impact of the decision

below on employee grievance procedures). Second, the majority's decision is in fact patently wrong for all of the reasons discussed in Part I, *supra*, and Part II of the petition.

In any event, this Court routinely grants certiorari even when further proceedings would otherwise be pending before the district court. See, *e.g.*, *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 168-170 (1994) (reversing denial of summary judgment); *Solorio* v. *United States*, 483 U.S. 435, 437 (1987) (reviewing decision that reinstated criminal charges following the trial court's dismissal of the indictment); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 469 (1977) (reversing denial of motion to dismiss). The interlocutory posture of a judgment is simply no "impediment to certiorari" when the decision below "has decided an important issue, otherwise worthy of review" and where resolution of that issue by the Court "may serve to hasten or finally resolve the litigation." Eugene Gressman, et al., Supreme Court Practice § 4.18, at 282 (9th ed. 2007).

Indeed, as the district court stressed, "review of this question at this point in the proceedings may advance the ultimate termination of this litigation, which has been pending for nearly [eleven] years." Pet. App. 48a. The district court reasoned that "[i]f the action were to proceed to trial before Weintraub could appeal the Court's ruling, he would be precluded from presenting the bulk of his First Amendment retaliation claim to the jury," and in the event of a later reversal, "the case would need to be retried, resulting in a substantial waste of resources on the part of the Court and the parties to this action." *Ibid.* This same rationale calls for the review and ul-

timate decision of these important legal questions before the lower courts invest the time and expense of trial.

III. The City Concedes That This Case Presents "Real" Splits On Important Constitutional Questions.

The City concedes, as it must, that this case presents two "real" circuit splits on "an important question of constitutional law." Opp. 5, 8. The City attempts to downplay the significance of these splits by arguing that "the two positions, as applied, are not irreconcilable in a material way," Opp. 21, but that is incorrect.

A. The "Related To" And "Required By" Standards Are Irreconcilable.

1. As we established in our petition, the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits define "pursuant to" to include all speech that facilitates an employee's official duties. Pet. 8-10. Courts in these circuits have consistently held that employee complaints are unprotected whenever they are *related* to official duties, regardless of whether the employee is *required* to file a complaint. See, *e.g.*, *Rohrbough* v. *Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010) (finding that a nurse's complaints about a staffing crisis in the hospital were unprotected speech because "the staffing crisis affected her ability to do her job and provide appropriate patient care"); *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (per curiam) (finding that athletic director's complaint was "pursuant to" official duties because it was "part-and-parcel of his concerns about the program he ran"). Under this standard, Mr. Weintraub's

complaint regarding the school administration's decision to not discipline a student was unprotected because it was a "means to fulfill," and "undertaken in the course of performing, * * * his primary employment responsibility of teaching," Pet. App. 12a, despite the fact that there was no evidence that Mr. Weintraub was *required* to file a grievance.

The Eighth and Ninth Circuit cases cited by the City cannot be squared with these decisions, and the City's reasoning to the contrary is conclusory at best. For example, in *Davenport* v. *University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), the Eighth Circuit found that found that a security officer's "duties did not include reporting either wrongdoing by a superior officer or a lack of resources" and that his complaint was therefore protected by the First Amendment. The City argues that the outcome in *Davenport* "would be no different under the 'related to' rubric" discussed above, Opp. 22, but the officer's complaints did in fact *relate* to his responsibilities and *affect* his ability to do his job. Under these facts, the complaints would clearly be deemed unprotected by the courts on the opposite side of the split.

Similarly, the City's unsupported assertion that "any of the eight Circuits applying the 'related to' test" would reach the same outcome in *Lindsey* v. *City of Orrick*, 491 F.3d 892 (8th Cir. 2007), is completely unfounded. Opp. 22. In *Lindsey*, the Eighth Circuit held that a city public works director's complaints regarding sunshine-law compliance were protected even though he was required to attend a training session on the state's sunshine law, because he was not required to ensure compliance with the law. See *Lindsey*, 491 F.3d at 898. Contrary to the City's

assertion, this case would have been decided differently in any of the eight Circuits applying the "related to" test because the official duties emanating from the sunshine-law training obviously related to the complaints regarding sunshine law violations that the Eighth Circuit found to be protected.

The City is also wrong to assert that the result in *Alaska* v. *EEOC*, 564 F.3d 1062, 1069 (9th Cir. 2009), cert. denied, 130 S. Ct. 1054 (2010), "would have been the same under either test" because the speech occurred in an open forum about issues of public concern. Opp. 22. The nature of the forum is not dispositive, see, *e.g.*, *Winder* v. *Erste*, 566 F.3d 209, 214–216 (D.C. Cir. 2009), (finding that testimony before a city council was unprotected), and the Ninth Circuit's finding that the employee's speech was not "pursuant to" her official duties because "official duties didn't require her to complain" presents a stark contrast with the rule imposed in the instant case. *Alaska*, 564 F.3d at 1070.

Finally, the City's assertion that the Ninth Circuit arrived at its decision in *Freitag* v. *Ayers*, 468 F.3d 528 (9th Cir. 2006), "without use of the 'required' language" is beside the point. Opp. 23. The court's finding that "[i]t was certainly not part of [the female corrections officer's] official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly," looks to what is officially *required* and not merely what is vaguely *related* to duties like the complaint to an outside union regarding classroom safety at issue here. *Freitag*, 468 F.3d at 545.

In each of these cases, the Eighth and Ninth Circuits held that "speech proffered outside the scope of the *requirements* of an employee's job duties is al-

ways constitutionally protected." Opp. 23 (emphasis added). Mr. Weintraub would have obtained a different result if he had taught fifth grade in a public school system in any of the 16 states within the jurisdiction of the Eighth or Ninth Circuits because there was no *requirement* that he file a grievance petition with the external teachers' union, his speech merely *related to* the topic of student discipline. Accordingly, this clear split in authority warrants review.

2. The City's argument that "the test involves a * * * practical determination of what is normally incorporated in a job title," Opp. 24, does not cut against the requirement standard imposed by the Eighth and Ninth Circuits. Instead, the practical nature of the inquiry counsels in favor of regarding the question as a mixed question of law and fact, and allowing a fact finder to determine precisely what is involved in a job regardless of what is written. See *Posey* v. *Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008); *Reilly* v. *City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008), cert. denied, 129 S. Ct. 1316 (2009).

B. The Standard of Review Materially Impacts The Outcomes Of Cases.

The City concedes that the well recognized split among the courts of appeals over whether to analyze *Garcetti*'s "pursuant to" standard as a question of law or as a mixed question of law and fact is "real." See Opp. 5. The City's only response to this split is the conclusory assertion that "allowing a jury to determine factual issues or restricting them to a District Court judge would not in a substantial majority of cases change the outcome." Opp. 25. That is a non

sequitur. The question is not *who* should decide the facts, but *whether* there are facts to be decided.[1]

As the City stresses, this Court adopted a "practical" approach to job duties, recognizing that "'[f]ormal job descriptions often bear little resemblance to the duties an employee actually [is] expected to perform.'" Opp. 24 (quoting *Garcetti*, 547 U.S. at 424-425). It is precisely this practical component of the inquiry where fact finding can have a profound impact. In *Frietag*, for example, the Ninth Circuit remanded for a factual determination of "whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director" and "what the union contract provides with respect to the persons to whom such grievances may or must be presented." *Freitag*, 468 F.3d at 546.

Here, the same factual inquiry could have resulted in a different outcome for Mr. Weintraub. A factual determination of whether Mr. Weintraub was expected to petition the external union and what the union contract provided could have prompted the reasonable conclusion that Mr. Weintraub's "duties as a teacher did not *require* him to take any further steps such as approaching Goodman about the situation or commencing a dispute-resolution proceeding." See Pet. App. 47a. Thus, review is warranted because the Third, Seventh,[2] and Ninth Circuits would

---

[1] In any event, the City's statement that "Petitioner did not request a jury" misstates the record. The demand for a jury trial is endorsed on the face of the summons filed in the district court that commenced this action.

[2] The City contends that the Seventh Circuit treats the "pursuant to" inquiry as a question of law despite applying the stan-

have remanded this case for factual determinations, and those determinations could well have altered the outcome of this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC
20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

---

dard of "rational trier of fact" because the Court cited *Connick* v. *Myers*, 461 U.S. 138, 148 (1983). Opp. 26-27 (citing *Davis* v. *Cook County*, 534 F.3d 650 (7th Cir. 2008)). But the citation to *Connick* is not dispositive. As the Ninth Circuit explained, "*Garcetti* has transformed [the inquiry] into a mixed question of fact and law." *Posey*, 546 F.3d at 1127.

Supreme Court, U.S.
FILED
SEP 13 2010
OFFICE OF THE CLERK

170

(3)

No. 10-202

IN THE

Supreme Court of the United States

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ALICE O'BRIEN
MICHAEL D. SIMPSON
PHILIP A. HOSTAK
NATIONAL EDUCATION ASSOCIATION
Office of General Counsel
1201 16th Street, N.W.
Suite 820
Washington, D.C. 20036
(202) 822-7035

JEREMIAH A. COLLINS
Counsel of Record
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600
jcollins@bredhoff.com

Counsel for Amicus Curiae

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT: THE *GARCETTI* RULE PROPERLY APPLIES ONLY TO SPEECH THAT CONSTITUTES THE PERFORMANCE OF JOB DUTIES SUCH THAT THE EMPLOYER HAD THE RIGHT TO PRESCRIBE THE CONTENT OF THE SPEECH IN THE FIRST PLACE, AND DOES NOT APPLY TO SPEECH EXPRESSED IN A GRIEVANCE AGAINST THE EMPLOYER	6
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:	Page
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	10
Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n, 447 U.S. 557 (1980)	12
Connick v. Myers, 461 U.S. 138 (1983)	6
Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	10
First National Bank of Boston v. Bellotti, U.S. 765 (1978)	12
Garcetti v. Ceballos, 547 U.S. 410 (2006)	*passim*
Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 410 (1979)	3, 7
Pickering v. Board of Educ., 391 U.S. 563 (1968)	3, 5
Pleasant Grove City v. Summum, __ U.S. __, 129 S. Ct. 1125 (2009)	8
Rankin v. McPherson, 483 U.S. 378 (1987)	7
San Diego v. Roe, 543 U.S. 77 (2004)	3, 6
United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)	10
Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	12

TABLE OF AUTHORITIES—Continued

Page

Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007) 3, 4

LAWS

N.Y. Civil Service Law § 200 (Consol. 2010) 2

MISCELLANEOUS

Benjamin Aaron, *Procedural Due Process and the Duty of Fair Representation in Public Sector Grievance Disputes*, in *Labor Relations Law in the Public Sector* (Andria S. Knapp ed. American Bar Ass'n 1977) 2

Elkouri & Elkouri, *How Arbitration Works* (6th ed. 2003) 2

Jill Kriesky, *Trends in Dispute Resolution in The Public Sector*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Adrienne E. Eaton & Jeffrey H. Keefe eds., Industrial Relations Research Ass'n 1999)..... 2

Julius G. Getman, et al., *Labor Management Relations and the Law* (Foundation Press 2d ed. 1999) 2

Richard C. Kearney & David G. Carnevale, *Labor Relations in the Public Sector* (Marcel Dekker, Inc. 2001) 2

William H. Holley, et al., *The Labor Relations Process* (South-Western 9th ed. 2008) 2

INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent of the parties,[1] on behalf of the National Education Association (NEA), a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States. Many of NEA's members are covered by collective bargaining agreements, and many of those agreements contain a grievance procedure.

Because NEA's members have a vital interest in the scope of First Amendment protection of job-related speech, NEA submitted a brief *amicus curiae* in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in which this Court addressed the application of the First Amendment to speech made pursuant to an employee's official duties, and in *Connick v. Myers*, 461 U.S. 138 (1983), as well as in numerous other cases in this Court concerning the constitutional rights of teachers and other public employees.

This case concerns the application of the teachings of *Connick* and *Garcetti* to speech by a teacher on a matter of public concern that is voiced through the grievance procedure of a collective bargaining agreement. Because many of NEA's members work under agreements that provide for such procedures, the First Amendment issue in this case arises in a context of particular significance to NEA and its members.

---

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Most public sector collective bargaining agreements contain grievance procedures. *See* Jill Kriesky, *Trends in Dispute Resolution in The Public Sector*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 247, 252 (Adrienne E. Eaton & Jeffrey H. Keefe eds., Industrial Relations Research Ass'n 1999). New York's Taylor Law, like many public sector labor relations statutes, expressly "encourag[es]... public employers and ... employee organizations to agree upon procedures for resolving disputes." N.Y. Civil Service Law § 200 (Consol. 2010).

Typically, a grievance procedure provides for a series of "steps" in which the employee or the union, on the one side, and the employer, on the other, lay out their positions with respect to a dispute, generally in writing, followed, if the matter is still unresolved, by arbitration before a neutral arbitrator, whose decision is typically final and binding except for a limited right to judicial review. *See, e.g.*, Richard C. Kearney & David G. Carnevale, *Labor Relations in the Public Sector* 302-07 (Marcel Dekker, Inc. 2001); Elkouri & Elkouri, *How Arbitration Works* 210, 213-14, 259 (6th ed. 2003); William H. Holley, et al., *The Labor Relations Process* 428-29 (South-Western 9th ed. 2008); Julius G. Getman, et al., *Labor Management Relations and the Law* 187-88 (Foundation Press 2d ed. 1999).

In the public sector, grievance systems often allow employees and unions to raise not only questions about the interpretation and application of the collective bargaining agreement, but also disputes over the interpretation of statutes, regulations and policies. *See, e.g.*, Benjamin Aaron, *Procedural Due Process and the Duty of Fair Representation in Public Sector Grievance Disputes*, in *Labor Relations Law in the*

Public Sector 180 (Andria S. Knapp ed. American Bar Ass'n 1977).

In this case, the Court of Appeals observed that teacher David Weintraub, through his grievance, was advocating greater attention to "classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." Pet. App. 12a. The district court found there to be "no doubt" that Weintraub's speech was on "a matter of public concern, namely discipline in the public schools," Pet. App. 71a, and that, in pursuing his grievance, "Weintraub's ... primary motivation was a general concern for safety in the classroom and school," Pet. App. 73a. The Court of Appeals did not disagree with those findings. The case thus exemplifies the not uncommon situation in which a grievance procedure serves as a mechanism through which teachers and other public employees may express "informed opinions on important public issues." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004). For example, depending on the particular agreements involved, a dispute about whether resources necessary to effective teaching are being made available, such as was involved in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), or about whether a school is engaging in discriminatory practices, such as was involved in *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410 (1979), might well be presented through a grievance.

The Second Circuit held that school authorities were free under the First Amendment to retaliate against teacher Weintraub for his speech, even though the speech addressed a matter of public concern, was nondisruptive, and did not undermine any legitimate interests of the employer, because Weintraub's speech was based on his concerns about impediments to the "proper[ ] execut[ion of] his duties," Pet. App. 12a, quoting *Williams v. Dallas*

Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007), and the speech had been expressed through "[t]he lodging of a union grievance [which] is not a form or channel of discourse available to non-employee citizens," *id.* at 14a. In the view of the Second Circuit, this meant that the speech was "made pursuant to [an] employee's official duties," as those words were used in *Garcetti*, 547 U.S. at 413. The Second Circuit ignored the fact that *Garcetti* involved speech by which an employee "fulfill[ed] a responsibility" of his job, 547 U.S. at 421, and as to which the employer would have had the right to dictate the content, whereas in this case, filing a grievance against his employer was not a responsibility that was placed on Weintraub by his job duties, nor would the employer have had any right to dictate what Weintraub should say in such a grievance.

As the Petition states, the Second Circuit's broad interpretation of what constitutes speech "pursuant to" an employee's official duties for purposes of the *Garcetti* rule is consistent with the approach taken by a number of other circuits, which treat speech that in any way *facilitates or promotes* the performance of an employee's duties as falling outside First Amendment protection by virtue of *Garcetti;* but the decision conflicts with decisions of two circuits which have held that *Garcetti* denies protection only to speech that is *required by* an employee's official duties. *See* Petition at 7-15. Review should be granted to resolve that fundamental conflict. And this case presents a particularly apt vehicle to address the matter, both because of the prevalence and importance of public employee grievance systems and because the Second Circuit's holding compellingly illustrates the constitutionally indefensible results that are being reached by those Circuits which, like the court below, treat *Garcetti's* "pursuant to" requirement as satisfied where

an employee's speech is merely related to, but not dictated by, his job duties.

SUMMARY OF ARGUMENT

In *Garcetti* this Court recognized a narrow exception to the rule that, under the First Amendment, a public employee who speaks on a matter of public concern may be subjected to discipline only if the employee's speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The exception recognized by the Court in *Garcetti* allows a government employer to discipline an employee for speech with no First Amendment scrutiny at all in a limited class of cases: where the speech was "made pursuant to the employee's official duties" in the sense that, in speaking, the employee was "fulfilling a responsibility" of the job, 547 U.S. at 421, such that the public employer would have had the right to dictate the content of the employee's speech in the first place.

It is one thing to hold that First Amendment scrutiny has no place in a case like *Garcetti*, involving what is in essence government speech that the government has the right to prescribe; but it would be quite another thing to extend *Garcetti* to speech that merely relates to or facilitates the public employee's work. And, to apply *Garcetti* to speech expressed through a grievance *against* the government, which is at the furthest remove from government speech, is to completely unmoor the rule in *Garcetti* from its foundations.

Certiorari should be granted to resolve the split in the circuits over what *Garcetti* meant by speech "pursuant to [an] employee's official duties," and to correct the unwar-

ranted extension of *Garcetti* that is presented by the decision below.

ARGUMENT: THE *GARCETTI* RULE PROPERLY APPLIES ONLY TO SPEECH THAT CONSTITUTES THE PERFORMANCE OF JOB DUTIES SUCH THAT THE EMPLOYER HAD THE RIGHT TO PRESCRIBE THE CONTENT OF THE SPEECH IN THE FIRST PLACE, AND DOES NOT APPLY TO SPEECH EXPRESSED IN A GRIEVANCE AGAINST THE EMPLOYER

A. *Pickering* and *Connick* hold that, as a rule, speech by a public employee on a matter of public concern that does not harm legitimate interests of the public employer may not, consistent with the First Amendment, be made the subject of discipline. As this Court has recognized, the First Amendment provides protection to such speech not only because "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," *Connick v. Myers*, 461 U.S. 138, 142 (1983), but also because "[public employees, and] [t]eachers [in particular] are, as a class, the members of a community most likely to have informed and definite opinions" on matters of public concern related to the operation of government programs. *Garcetti*, 547 U.S. at 421, quoting *Pickering*, 391 U.S. at 572. Public employees thus are in a position to have uniquely "informed opinions on important public issues," *id.* at 420, quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004), of which "the community would be deprived . . . [w]ere [public employees] not able to speak on [the operation of their employers]," *id.*

Accordingly, as to matters of public concern, "expressions related to the speaker's job" can qualify for First Amendment protection against discipline or retaliation, *Garcetti*, 547 U.S. at 421, as long as the *Pickering* balance

is satisfied, and that is true whether the employee spoke to the public or "expressed his views inside his office, rather than publicly," *id.* at 420 (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)). *See also Rankin v. McPherson*, 483 U.S. 378, 387 n. 11 (1987).

B. In *Garcetti*, this Court recognized a limited class of cases in which the First Amendment provides a public employee with no protection whatsoever against being disciplined for speech on a matter of public concern, without regard to *Pickering* balance. The Court described this class of cases as those in which discipline is imposed "based on speech made pursuant to the employee's official duties." *Garcetti*, 547 U.S. at 413. As the Court explained, "[t]hat consideration" is present if an employee's speech consisted of "fulfilling a responsibility" of his job, *id.* at 421—in Ceballos' case, "to advise his supervisor about how best to proceed with a pending case," *id.* The speech at issue in *Garcetti* was "part of what [Ceballos], as a calendar deputy, was employed to do," *id.*; it constituted an "official communication[ ]," *id.* at 423, which, as the Court explained, Ceballos' supervisors could properly insist be "accurate, demonstrate sound judgment, and promote the employer's mission," *id.*

1. Thus, the "consideration" that constituted the "controlling factor in Ceballos' case," *id.* at 421, was not that his speech "concerned the subject matter of [his] employment," *id.*, which the Court stated was "nondispositive," *id.*, or that the subject matter was related to the "proper[] execut[ion] [of] his duties," Pet. App. 12a, which the Second Circuit in this case regarded as the key consideration. Rather, the "controlling factor," *Garcetti*, 547 U.S. at 421, was that the speech constituted an "official communication" which Ceballos was required to make *in order to fulfill a responsibility of his position* – and one as to which his superiors would have had *the right to dic-*

tate the content. In that limited context, where disciplining an employee for speech amounts to disciplining the employee for not "performing his or her job duties [properly]," *id.* at 423, the Court reasoned that the fact that the employee's job duties took the form of speech does not provide grounds for "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business," *id.*

2. On its facts and in its reasoning, *Garcetti* is confined to situations where an employee's speech is in essence *government* speech as to which the government has plenary authority to dictate what an employee should state in the first place, and which therefore should not be subject to First Amendment review when the government decides that the employee's government speech work product was unsatisfactory. *See generally Pleasant Grove City v. Summum*, __ U.S. __, 129 S. Ct. 1125, 1131 (2009) (emphasizing government's authority to control its own expression); *id.* at 1139 (Stevens, J. concurring) (citing *Garcetti* as an application of the "government speech doctrine").

Speech in the form of a grievance against a government employer is the *antithesis* of government speech. It is speech that asserts a claim *against* the government, through a process in which the employee and the employer are expressly cast in the role of adversaries. *See supra* at 2. To regard such speech as government speech would be to say that the government has filed a grievance against itself. Equally to the point, unlike speech as to which the public employer would have a right to dictate the content, such as the disposition memorandum in *Garcetti* and similar "official communications," *Garcetti*, 547 U.S. at 423, Weintraub's employer obviously had no right to tell him what to say in framing and pursuing a grievance against the employer.

As to grievance speech, and other speech in which an employee is not imparting a message as to which the government would have a right to dictate the content, the categorical rule of *Garcetti* is inapposite. In such a case the *Pickering* balance adequately protects "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and the unfettered power to discipline employees for their speech on matters of public concern that is available to a public employer in cases like *Garcetti* is neither necessary nor appropriate.

3. Far from suggesting that its decision should be given the expansive reading adopted by the Second Circuit and several of the other Circuits, in *Garcetti* this Court took care to limit the application of the rule in that case to situations where it has been "demonstrate[d] that conducting the task [that involved the speech for which the employee was disciplined] is within the scope of the employee's professional duties for First Amendment purposes." 547 U.S. at 425. What is more, the *Garcetti* Court recognized the importance of protecting public employees in giving their uniquely "informed . . . opinions" about government operations, *id.* at 419-20; and it is precisely when public employees are speaking about subjects closely related to their job duties that they are "the members of a community most likely to have informed and definite opinions" regarding such matters, *id.* at 421. That being the case, to hold that employees' speech on matters of public concern may be subjected to discipline or retaliation without any First Amendment protection merely because the speech was closely connected to the employees' job duties would lead to the very kinds of "widespread costs" to society, *id.* at 419, that *Garcetti* recognized as a reason why public employees' speech related to their jobs should not be readily "repressed," *id.*

4. The court below considered its holding to be "supported by the fact that [Weintraub's] speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue." Pet. App. 13a. This reasoning fails on its own terms. Considering that the First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances," and that public employees are among "the people" who have that right, it is difficult to understand how speech by a public employee on a matter of public concern that is expressed as a formal grievance against the government employer is not sufficiently "citizen-like" to warrant protection. On the contrary, if one wishes to inventory "speech by citizens who are not government employees," *Garcetti*, 547 U.S. 423, in search of a "relevant analogue," *id.*, to a petition for redress that is expressed through an employee grievance arbitration system, such analogues are readily at hand in the form of judicial and administrative procedures invoked by individuals, businesses and other members of the polity. *Cf. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Moreover, *Garcetti* cannot properly be read as calling for the application of a distinct "citizen analogue" test, separate and apart from an analysis of whether the speech in question was uttered "pursuant to ...official duties," 457 U.S. at 421. Rather, this Court's reference to the concept of a "relevant analogue to speech by citizens who are not government employees" was part of a discussion of "the theoretical underpinnings of" the Court's case law in this area, and it was presented as a further explanation of why speech "pursuant to official duties" is not protected:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. .... When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

Id. at 423-24. In its context, this passage makes clear that the concept of a "relevant analogue to speech by citizens who are not public employees" is not a separate First Amendment requirement, but rather an aid to understanding why speech pursuant to official duties is not protected against discipline.

It thus is clear that nothing in *Garcetti* calls for a mechanistic "citizen analogue" test such as the court below applied. It cannot be the case that, as the court below assumed, Pet. App. 14, speech by a public employee will be unprotected merely because the precise mechanism by which the employee conveyed that speech is one that is not available to all other citizens. After all, as the dissent below recognized, the teacher in *Givhan* had access to speak to the school principal in a way "that a regular citizen likely could not [have]," Pet. App. 20a, but her speech was no less protected for that fact.[2]

---

[2] Furthermore, an overly literal application of any "citizen speech" requirement would be at odds with fundamental principles of this Court's First Amendment jurisprudence. For example, corporations, unlike public employees, are not citizens at all; but in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this court, recognizing that a speaker need not be speaking in any particular capacity in order to be engaging in "expression that the First Amendment was meant to protect," *id.* at 776, held that the First Amendment protects a corporation speaking as a corporation. Similarly, a business entity

* * * *

As a rule, speech by a public employee on a matter of public concern relating to his job is "expression that the First Amendment was meant to protect," *First National Bank of Bellotti*, *supra* note 2, 435 U.S. at 776, *particularly* when it is based on knowledge about government operations that the employee's job makes him uniquely qualified to obtain. *See supra* at 9. As *Garcetti* recognizes, that principle does not apply where the employee is speaking as part of his job such that the government has the right to dictate the message. But *Garcetti's* reasoning cannot be extended to cases where, in the speech at issue, the employee was *not* tasked with delivering the government's message, but was conveying his own opinion in circumstances where he was free to do so. An employee's pursuit of a grievance against a government employer is a paradigmatic example of the latter category of case. In equating this with the very different situation that is the subject of the *Garcetti* rule, the Second Circuit cut the rule away from its underpinnings and reached a result that is at war with basic First Amendment principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

that merely proposes a commercial transaction is not easily characterized as speaking "as a citizen," *see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976), but such commercial speech is protected by the First Amendment against regulation that is not shown to serve a sufficient governmental purpose, *see Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Respectfully submitted,

ALICE O'BRIEN
MICHAEL D. SIMPSON
PHILIP A. HOSTAK
NATIONAL EDUCATION ASSOCIATION
Office of General Counsel
1201 16th Street, N.W.
Suite 820
Washington, D.C. 20036
(202) 822-7035

JEREMIAH A. COLLINS
Counsel of Record
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600
jcollins@bredhoff.com

Counsel for Amicus Curiae